92-1492

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

JAMES L. GRATZ AND THERESE GRATZ,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the agency's post-termination process which occurred after property rights were liquidated, coupled with the agency's abridgment of its own regulatory due process procedures, violated the procedural due process protections to a meaningful prior notice and hearing?

Whether the agency's violation of its own regulations abridged the protections of procedural or substantive due process?

Whether the agency's decision contrary to the findings of its own quality experts, without competent contrary evidence, or, arbitrary cancellation of contracts, constitutes a violation of substantive due process?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceeding in the United States Court of Appeals for the Federal Circuit.

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No. _____

In The

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JAMES L. GRATZ AND THERESE GRATZ,

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THE UNITED STATES,

Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners James L. Gratz and Therese Gratz (hereinafter "Gratz") respectfully petition that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Federal Circuit entered December 14, 1992, affirming the judgment of the United States Claims Court.

OPINIONS BELOW

The judgment dated December 14, 1992, of the United States Court of Appeals for the Federal Circuit, affirmed a trial court's grant of summary judgment to the

United States and denial of summary judgment to Gratzes.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The decision upon which jurisdiction is claimed is the judgment entered by the Clerk of the United States Court of Appeals for the Federal Circuit on December 14, 1992. A1. Under Supreme Court Rule 13.4, this petition is timely; it is filed within 90 days of the entry of the judgment.

Jurisdiction of the lower courts for the constitutional claims was established under 28 U.S.C. § 1491 (a)(1), The Tucker Act, together with those statutes mandating payments to participants in either the loan or reserve storage programs. *United States v. Tetstan*, 424 U.S. 392, 398 (1976); *Frank's Livestock v. U.S.*, 905 F.2d 1515, 1557 n. 2 (Fed. Cir. 1990). 7 U.S.C.S. 1444(d), 1444(e) and 1446.

CONSTITUTIONAL PROVISIONS INVOLVED

Plaintiffs invoke the Fifth Amendment rights to procedural and substantive due process. The Fifth Amendment reads, "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in land or naval forces or in the militia when actual service in time of war or public danger; nor shall any

person be subject to the same offense twice be put in jeopardy of life or limb; nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

PROVISIONS OF STATUTES INVOLVED

No statutes are specifically at issue.

PROVISIONS OF RULES INVOLVED

A producer who is accepted into the grain reserve for farm storage must maintain certain quality requirements. For farm-stored feed grains the quality must be evaluated and satisfy the following requirements under 7 C.F.R. § 1421.748 (a) & (c).

a. *General.* Quality will be determined according to the Official United States Standards for Grain, Federal Grain Inspection Service (FGIS), U.S. Department of Agriculture.

c. *Feed grains.* Feed grains which enter the reserve must meet the quality eligibility requirements for securing a regular CCC price support loan. However, feed grains which grade "Sample Grade" will not be eligible to enter the reserve.

The FGIS inspects grain in accordance with the United States Grain Standards Act. 39 Stat. 42, Chp. 313,

part B. Official United States Standards for Grain list six criteria for evaluating corn; from best to worst these grades are USDA Nos. 1 through 5 and Sample Grade. A69. Each of these grades allows an increasing tolerance for foreign matter such as weevils, crusting, moisture, mold, and warm spots. A68-70. After the grain enters the reserve it must maintain and be evaluated under the Official Standards for Grading Grain under 7 C.F.R. § 1421.909. A16. Quality of corn stored under the regular price support loan must also be based on the same standards. 7 C.F.R. § 1421.92 Congress intended to provide a means by which excess grain could be stored for a long period of time and released if the grain supplies became short. 1949 U.S. Code Cong. & Admin News 2407 *et seq.*

In the case on petition the Government did not follow these regulated inspection criteria. A17-18. Instead, the County ASCS hired inspectors to issue overall quality gradations designating either a "satisfactory" or "questionable" rating. A17. Had the inspectors rated the grain stored under these contracts as questionable the producers were allowed 30 days to correct any perceived quality problems. A47. Internal regulation ¶ 78 of 1-LP (Rev. 5) states:

> **STORABILITY OF LOAN COLLATERAL THREATENED.**
>
> The producer is responsible for any loss in quantity and quality of the commodity placed under farm-stored loan. CCC will not assume any loss except according to paragraph 162.

A. If Storability of Collateral is threatened and it is:

   1. Reported by the producer, inspect commodity immediately. Samples may be drawn to confirm report.

   2. Discovered by the commodity inspector, immediately notify the producer of the findings, in writing.

B. In addition to the action taken in subparagraph A, the County Office shall notify the producer that:

   1. Corrective action must be taken.

   2. The commodity will be inspected within 30 days.

   3. If the producer does not correct the problem within 30 days, the loan will be called.

Further, no regulation permits the County ASCS committee or office to override the overall quality determinations made by the very same inspectors they hired. The County ASCS, without the aid of experts, is not competent to officially grade grain. A57. Gratzes had thirteen contracts at issue. Eleven contracts never received a questionable rating. A6-7. For the grain stored under two separate contracts that did receive a questionable rating the County ASCS was required first to comply with ¶ 78 of 1-LP (Rev. 5) and, then notify Gratzes of their rights to appeal. [See, A34-35].

3-CP, ¶ 16 Program Determinations.

Any initial program determination listed in paragraph 2 shall contain written notification of the producer's rights to appeal. Notification shall contain the:

A. Name and address of the reviewing authority to whom the appeal must be sent.

B. Appeal requirements. See paragraph 18.

C. Time limitations. See paragraph 19.

This regulation was not followed until January 8, 1988 after the Government had already taken over 52,000 bushels of Gratzes' corn. *Infra*, p. 11; 13.

Once the producers are notified of their appeal rights and timely invokes them, a full range of administrative appeals is provided under regulation 7 C.F.R. Part 780.

7 C.F.R. PART 780

§ 780.3 Request for reconsideration.

Any producer or participant who is dissatisfied with any determination initially made by the county committee or office, State committee or Deputy Administrator, may obtain a reconsideration of such determination and an informal hearing in connection therewith by filing a request for reconsideration with the county committee. If the initial determination was made by the State committee or the Deputy Administrator, the county committee shall forward the request for reconsideration to the authority initially making the determination.

[29 FR 8200, June 30, 1964; 29 FR 8460, July 2, 1964]

§ 780.4 Appeal to the State committee

Any producer or participant who is dissatisfied with the determination of the county committee upon its reconsideration of the initial determination made by it or the county office

may obtain a review of such determination by the State committee and an informal hearing in connection therewith by filing an appeal with the State committee.

§ 780.5 Appeal to Deputy Administrator

Except as provided in § 780.11 (a) and (b), any producer or participant who is dissatisfied with the determination of the State committee upon reconsideration of its determination or upon appeal from a determination of the county committee may obtain a review by the Deputy Administrator of such determination and an informal hearing in connection therewith by filing an appeal with the Deputy Administrator.

§ 780.6 Time limitations for filing requests for reconsideration or appeals.

(a) A request for reconsideration or appeal from any determination shall be filed within 15 days after the written notice of the determination is mailed to or other wise made available to the producer or participant. A request for reconsideration or appeal shall be considered "filed" when personally delivered or, if mail is used, when post-marked.

STATEMENT OF CASE

Gratzes were participants since 1981 in two USDA programs for feed grains; reserve storage and regular loans.

1. Statute and Regulatory Background

The lower court's review of the "Regulatory Framework" needs to be more complete.

The Agricultural Act of 1949, as amended, 7 U.S.C.S. § 1421 *et seq.*, sets forth the major price support and production adjustment programs that are available to producers. Congress provided producers in the grain storage and regular loan programs with mandatory rights to payments of money. 7 U.S.C.S. § 1444d, 1444c and 1446 (1988). Within the individual titles of the 1949 Act, specific references are made to CCC's authority to carry out such programs. In accordance with section 5(g) of the CCC Charter Act (15 U.S.C.S. § 714C(g)), the CCC conducts the administration of the major agricultural commodity programs, including the ones at issue here. Day-to-day operations of administering domestic CCC programs are performed generally by Agricultural Stabilization and Conservation Service (ASCS).

The Secretary of Agriculture is authorized to utilize the services of local and State committees in each state to carry out programs and functions of the Department of Agriculture. 16 U.S.C. § 590h. The State committees, referred to as State ASCS, consist of producers that are selected by the Secretary from each state. Day-to-day operations of the office are supervised by the State Executive Director (SED). The SED serves at the pleasure of the Secretary. The State ASCS reviews appeals of decisions made by county committees pursuant to 7 C.F.R. Part 780. The State ASCS office provide relevant documents to County ASCS offices and supervise the activities of these offices. A county committee is established for each

county. Committee members are elected by area producers. Duties include review and dissemination of the program material submitted to them by the State committees, ensuring the proper administration of these programs in the county, and serving as the first level of review under the appeal procedures (7 C.F.R. Part 780). Duties of the ASCS county office personnel include preparation of price support loan and purchase documents, disbursement of proceeds pursuant to such agreements, and compliance. Day-to-day operation of the office is under the direction of the County Executive Director (CED) who is hired by and serves at the pleasure of the county committee.

A national ASCS office in Washington, D.C., (known as DASCO) completes the organizational structure. DASCO supervises and directs the implementation of the commodity programs. 7 C.F.R. § 1421.2. This includes development of contracts and regulations that set forth the terms and conditions of these programs. DASCO, or his designee, also renders the final determinations in administrative appeals program participants under 7 C.F.R. Part 780.

CCC has been given statutory authority from Congress to establish a series of loan programs. 7 U.S.C. § 1421 et seq. Under these programs, CCC lends to a producer a certain amount of money per unit of measured commodity for a fixed period of time. At the end of loan period, the producer may either forfeit the commodity collateral to CCC or repay the loan with interest. The producer may have a third option of placing the commodity into the CCC grain reserve. 7 C.F.R. § 1421.740 et seq. CCC pays producers a fee for storing grain that is

part of the reserve. 7 C.F.R. § 1421.749. Missing storage payments, in large measure, comprise Gratzes' losses.

ASCS on behalf of CCC has issued regulations governing the operation of the CCC Grain Reserve program. These regulations are found at 7 C.F.R. 1421.740 et seq. The reserve has two components: grain that is stored in warehouses and grain that is stored on a farm. This action only concerns the farm stored portion of the reserve. Once a producer is accepted into the reserve for farm storage, they must maintain certain quality requirements under 7 C.F.R. §§ 1421.748 (a), (c) and 1421.909. Quality of corn held under regular loan contracts must also be graded in accordance with the Official Standards for Grading Grain. 7 C.F.R. § 1421.92.

The lower courts found that 7 C.F.R. § 1421.6(d) (1987) allows the Secretary to call loans at anytime subject to judicial review. A4; 16. This regulation is inapplicable to storage contracts. A16. Here, 10 out of 13 contracts were storage contracts, not loans. A38.

2. Statement of Facts

a. Rotation Agreement.

In a May 19, 1987 letter the County ASCS represented to Gratzes that the quality of several bins of grain stored under seven contracts was "questionable". A36-7. The County ASCS's letter, except for two isolated instances, was not accurate, since the inspectors hired by the county issued overall gradations of "satisfactory". A6; A27 ¶ 16. The County ASCS letter did not give Gratzes 30 days to

correct the problem as mandated by regulation or notify them of their appeal rights. A27 ¶ 19. As a resolution, the County ASCS required Gratzes to rotate the grain (meaning sell the old and replace it with acceptable corn). Gratzes were required to rotate grain that did not receive a questionable inspection rating. Id, at ¶ 20. The parties reached a mutual accord on June 8, 1987. A39. A letter outlining the agreement stipulated that Gratzes' lienholder, if any, would receive the proceeds from the corn they would rotate. A39. On August 3, 1987 the rotation request was again approved. A43. When the proceeds became payable to Gratzes, the county kept the money and did not pay Gratzes or their lienholder as previously represented, because new lien waivers were not obtained. Internal regulation 1-LP (Rev. 5) part b § 326 (1987) did not require new lien waivers. A47-48. Original lien waivers covering all thirteen loan or storage contracts had to be on file when each Farm Storage and Security Agreement was signed by the County ASCS office. A7. Gratzes were unable to buy new grain to rotate back into the reserve storage program. A29 ¶ 29. Gratzes loss their storage payments in the 20,000 bushels. A27-8; 39. The lower courts agreed that all but two contracts received "satisfactory" ratings, that all 13 lien waivers were already on file, and (by silent acquiescence) that Gratzes were not informed of their appeal rights. A6-7. Respondent's actions violated Gratzes' rights to procedural and substantive due process.

b. Second confiscation, without notice or hearing

Without a meaningful prior notice or hearing the County ASCS, on September 23, 1987, revoked Gratzes' interests in all their grain reserve storage contracts, three loan contracts, and right to place said regular loans into the grain reserve storage program, as provided by regulation 7 C.F.R. § 1421.743. A29 ¶ 31. The County ASCS cited three alleged problems, first the unauthorized disposition of grain under contract 85-154-1, second the continuing quality problems, and third Gratzes' noncompliance with Respondent's irregulatory demand for written leases on loan contracts 18 and 74 for the 1988 crop year. A29 ¶ 32.

Each subsequent administrative appellate tribunal agreed that the unauthorized disposition of grain under contract number 85-154-1 did not occur. A13, A64. Yet the grain was taken and those damages have yet to be remedied. Academic reinstatement was permitted by DASCO. A64. Actual reinstatement was impossible since the grain was previously confiscated. A32 ¶ 52.

Grain quality determinations made by the county inspectors found that only one of the remaining contracts received a questionable grade, later raised to satisfactory. A8; 30 ¶ 34. The County ASCS conceded that it, without their inspectors, was unqualified to grade grain. A57.

The lower courts agreed that the written lease demand was not supported by regulation, it was for the next crop year (1988), and that it only covered grain held under loan contracts numbered 18 and 74. A8-9, 18.

Out of 13 contracts at issue, the rotation request covered contract number 82-138 (A27 ¶ 20), the

unauthorized disposition concerned contract 85-154-1, the written lease demand covered two loans (18 and 74), and only one storage contract was graded questionable by September 23, 1987. (A8). By this September 23, 1987 decision the County ASCS had actually stated reasons for calling only 5 out of 13 contracts. Nonetheless, they called all 13 contracts. Beginning on September 30, 1987 and continuing through October 13, 1987 the County ASCS took 41,282 bushels of corn from Gratzes. A30 ¶ 39. Damages accrued by the loss of storage payments as permitted by 7 C.F.R. § 1421.749.

c. Third confiscation, prior to a hearing.

On January 8, 1988 Respondent for the first time notifies Gratzes of their administrative rights to appeal a County ASCS decision to take another 41,856 bushels of grain. A49. The reasons to take the grain were the unauthorized disposition of grain under contract 85-154-1, continuing quality problems, and the lack of written leases. Id. Gratzes appeal rights were timely invoked, nonetheless, the USDA liquidated 31,856 bushels of corn before a hearing is conducted. A12; 31 ¶ 45. After the hearing on January 26, 1988, the County ASCS reached a decision against Gratzes' interests. A12. Gratzes appealed the County ASCS decision to the next level, the State ASCS office. Here, after a revision and modification, a final decision was reached on May 13, 1988. A13-14; 61. By May 13, 1988 both the unauthorized disposition and written lease issues were resolved in Gratzes' favor. Id. Grain quality was not addressed but the State ASCS did affirm the county's decision to take the grain. A14; 32; 58-62. Eleven of thirteen contracts at

all times received satisfactory ratings. A6; 10; 30. No grain contract ever received a "questionable" rating since the last one noted in September, 1987. A7; 30-31 ¶ 41. The inspectors' quality gradations were never questioned, on the record, by the County ASCS, State ASCS or DASCO. A30 ¶ 37. Gratzes' appealed to DASCO which affirmed in part the State ASCS decisions and then reinstated Gratzes' interests except to the extent the grain was not called due to "deteriorating conditions". A14. DASCO did not find that any of the grain was "questionable" nor affirm the county's abridgment of their inspectors' overall gradations. *Id.*; 65-66.

By the time the Washington ASCS authorized reinstatement, actual reinstatement had been impossible since the grain was previously confiscated and Respondent refuses to pay for the damages. A56.

In summary had the ASCS waited for Gratzes to exhaust their administrative appeal rights and followed their own inspectors' overall quality determinations, no harm would have resulted. No justification was ever provided by the Respondent to take more than five (5) out of the thirteen (13) grain contracts. At a minimum, Gratzes are entitled to damages for loss grain previously stored under the 8 uncontested contracts.

REASONS FOR GRANTING THE WRIT

A. PARTICIPANTS ACROSS THIS COUNTRY IN AGRICULTURAL PROGRAMS MUST CONTINUE TO BE AFFORDED WITH CONSTITUTIONAL PROTECTIONS OF DUE PROCESS, BY BRINGING THE FEDERAL CIRCUIT'S PRECEDENT IN LINE WITH THIS COURT.

While this case deals with feed grains, its implications are nationwide with the panoply of USDA programs in various crops from apples to wheat. Participants in other agency programs would also be affected. Due process is a constitutional right that belongs to all whose livelihoods are held in the balance when they conduct business with the federal government. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975).

Gratzes present three actions by the USDA that violated their rights to procedural due process. First, the unnoticed and unilateral change to the June 8, 1987 rotation agreement caused Grazes to lose their rights to store 20,000 bushels under their reserve program. Second, the September 23, to October 13, 1987 taking of 41,282 of Gratzes' grain without an effective prior notice and any hearing. Third, the January 23, 1988 taking of 31,856 bushels of Gratzes' grain after an effective notice but before a meaningful hearing could occur.

Advocating the farmer/producer position in both cases that the Federal Circuit relies upon as precedent, *Frank's Livestock* and *Gratz*, this writer is familiar with the facts and holdings. Gratzes' case makes a stronger appeal to apply due process since they lost possession of their grain before the initial administrative hearing while the

producer in *Frank's Livestock* maintained possession of their property interests until DASCO made its final determination. *Frank's Livestock v. U.S.*, 17 Cl. Ct. 601, 606 (1989). Gratzes lost possession before a hearing in all cases and a meaningful notice in two of three incidents.

The Federal Circuit's view that it's constitutionally permissible to provide procedural due process after the property is confiscated conflicts with this Court's precedent. *Cleveland Bd. of Education v. Loudermill,* 470 U.S. 532, 542 (1985) (property rights in public employment); *Goldberg v. Kelly,* 397 U.S. 254, 271 (1970) (property rights conferred to recipients of welfare benefits); *Atkins v. Parker,* 472 U.S. 115, 128 (1985) (property rights in food stamps); and, *California H.R.D. v. Java,* 407 U.S. 121, 130-133 (1977) (property rights to applicants of unemployment benefits).

The District Circuit has held that due process must be afforded to participants in agricultural programs. *Old Dominion Diary v. Sec. of Defense,* 631 F.2d 953, 962-963 (D.C. Cir. 1980) (property rights to continued participation in government subsidized agricultural programs). Gratzes' contract rights are considered constitutional property interests. *Old Dominion Diary, supra.* Rights to continued business with the government are protectable property interests. *California H.R.D. v. Java, supra; Related Industries v. U.S.*, 2 Cl. Ct. 517, 527 (1983) (lowest government contract bidder was deprived of due process without prior notice and hearing of the stigmatizing charges that prevented the acceptance of its bid).

Constitutional prior notice and hearings are usually necessary but the merits of this need will not be applied

by the Federal Circuit in agricultural programs, unless this Court reverses *Gratz v. U.S.* Subsequent hearings conducted after a confiscation occurs generally does not afford constitutional protection where property interests are at stake. Stretching the *Franks' Livestock* holding, where the producer's property was not taken until after they exhausted their administrative appeals, to include hearings conducted after a confiscation, thereby eliminating any effective remedy, is in conflict with the parameters of the Supreme Court's limited exception to the meaningful prior notice and hearing mandate.

Those limited holdings permitting a post-deprivation hearing require a statutory or a common law tort remedy to cure any harm that may occur. *E.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436, 365 (1982) (" 'the necessity of quick action by the State or the impracticality of providing any predeprivation process,' " may mean that a post-deprivation remedy is constitutionally adequate); *Memphis Light Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978) ("where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination," a prior hearing may not be required); *Ingraham v. Wright*, 430 U.S. 651, 682 (1977) (hearing not required before corporal punishment of junior high school students); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 619-20 (1974) (hearing not required before issuance of writ to sequester debtor's property).

Parratt v. Taylor, 451 U.S. 527 (1981) and *Hudson v. Palmer*, 468 U.S. 517 (1986) represent a special case to the general *Mathews v. Eldridge*, [424 U.S. 319, 335 (1976)]

analysis, in which post-deprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide. The application of the holdings in *Parratt* and *Hudson* cases have been limited to prisoner concerns. *Soldal v. Cook County, Ill.*, 113 S.Ct. 538, 545 (1992).

Any doubt is resolved in favor of the constitutional right applying to protect the harm. *Zinermon v Burch*, 110 S.Ct. 975, 989-990 (1990) (holding that a state must provide pretermination notice and hearing to allegedly dangerous mentally ill person). In reaching its holding this Court applied a three part test. First, the state could not show that the deprivation was unpredictable. Second, it was not impossible to provide a predeprivation process. Third, the conduct of the employee was authorized. 110 S.Ct. at 989-90. Neither the Respondent nor lower courts made citations to the record to meet this three part conjunctive test.

This Court has numerous times explained that constitutional due process requires a meaningful prior notice of an agency's concerns, so the private citizen has the ability to correct them or appeal the determination and to have an impartial arbiter decide the factual issues. *E.g., Sec. of Agriculture v. U.S.*, 347 U.S. 645, 653 (1954); *Service v. Dulles*, 354 U.S. 363, 379-380 (1957); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). Leaving the Federal Circuit with an agricultural exception is impermissible with constitutional due process freedoms. Gratzes and those people similarly situated, are required to sue for damages only in the claims court. *U.S. v. Mitchell*, 463 U.S. 206, 216 (1983); *Cf, Bowen v. Massachusetts*, 484 U.S. 879, 892-901 (1988).

Unless this Court grants the writ and reverses the judgments below, participants in agricultural programs nationwide will not be able to sue the United States for damages when they lose their property interests as a result of a procedural due process violation. Absence direction from this Court, precedent from the Federal Circuit is doctrine for the nation's agricultural producers.

B. GRANTING THE WRIT WILL ALLOW THIS COURT TO EXPOUND ON THE FREEDOMS FROM ARBITRARY ENFORCEMENT OF THE LAWS OR POWER OF GOVERNMENT, DECREASE THE DICHOTOMY OF CONTRADICTORY LAWS, AND ALLOW BUSINESSES THE ABILITY TO KNOW HOW TO CONFORM.

Gratzes' case actually gives this Court four fact situations in which to articulate when a violation of substantive due process occurs. Unilateral changes in an agreement, the agency's overruling of its own experts' opinions (without contrary evidence), disobedience of their own regulations, and the cancellation of contracts not in dispute place the scope of substantive due process on the bench. For example, when the agency never expressed a justification to call at least 8 grain contracts, substantive due process rights were violated. *Camp v. Pitts*, 411 U.S. 138, 141 (1973); *F.P.C. v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976). Responsible producers and government need to know what are the risks of doing business with each other.

Substantive violations also occurred when, as of September 23, 1987, only one of Gratzes' loan or storage

facilities was graded as questionable by the inspectors hired by the county. A8; 34 ¶ 34. Conceding this fact, the lower courts argued that the inspectors ignored the totality of the inspection reports and then defered to the Agency's alleged expertise. A17-18. Doctrinal error is assigned since the agency violated their own inspection regulations. *Service v. Dulles*, 354 U.S. 363, 379-80 (1957). Additional error is assigned since the lower courts' substituted their factual judgment for that of the inspectors when the County ASCS conceded that it, without the aid of its inspectors, was unqualified to grade grain. A57. Total consideration of all relevant facts was considered by the inspectors who graded the grain satisfactory. None of the lower administrative tribunals, including the County ASCS, provided any competent reason why the inspection reports were not followed.

Arbitrary rulings exist when an agency's decision has no basis in competent fact, relied upon factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence, or is so implausible it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). Finding that a white car is black, the sun is the moon, or that satisfactory grain is unsatisfactory provides a contrite application of substantive due process. Had the County ASCS respected Gratzes' due process rights by waiting until after Gratzes' administrative appeal rights were exhausted, coupled with an adherence to the inspectors' quality determinations,

DASCO's reinstatement would have made petitioners whole.

The best evidence of why it is necessary to provide due process is DASCO academic reinstatement of Gratzes. Patience would have yielded both parties what they desired, a compliant producer for the County ASCS and price support payments to Gratzes. Such a win-win situation must be endorsed by this Court.

CONCLUSION

Precedent from the Federal Circuit allowing for procedural due process protections after property and liberty interests are taken and permitting an agency to disregard its own rules and experts' opinions is too divergent from this Court's doctrine to pass unreviewed. If the writ is not granted then it is likely that participants in agricultural programs are without constitutional rights, for the Federal Circuit will not apply them in conformity with precedent from this Court.

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Note: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

92-5111

JAMES L. GRATZ and THERESE GRATZ,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

JUDGMENT

(Filed Dec. 14, 1992)

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 91-1107 C

This CAUSE having been considered, it is

ORDERED and ADJUDGED:

Per Curiam (NIES, *Chief Judge*, LOURIE and SCHALL, *Circuit Judges*):

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED DEC 14 1992

/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: January 4, 1992

IN THE UNITED STATES CLAIMS COURT

No. 91-1107C
(Filed March 2, 1992)

JAMES L. and THERESE GRATZ, Plaintiffs, v. THE UNITED STATES, Defendant.	* * * * * * * * * * * * * * * * * *	Contracts; Agricultural Stabilization and Conservation program; price support and program for corn; grain reserve; call of loan collateral.

Michael A. Pinotti, Roseville, Minnesota, for plaintiffs.

Scott E. Ray, Washington, D.C., with whom was *Assistant Attorney General Stuart M. Gerson,* for Defendant.

OPINION

NETTESHEIM, Judge.

This case is before the court after argument on the parties' cross-motions for summary judgment. The issue for decision is whether the Department of Agriculture's Agricultural Stabilization and Conservation Service properly called and ordered delivery of plaintiff's loan collateral.

FACTS

The following facts derive from the administrative record and are undisputed, unless otherwise noted. James

L. and Therese Gratz ("plaintffs") operate farms in Lafayette County, Wisconsin. During the period in question, plaintiffs participated in the Price Support, Farm Storage Grain Reserve and Special Producer (also known as "Production Adjustment") loan programs administered by the Commodity Credit Corporation (the "CCC") through the LaFayette County Agricultural Stabilization and Conservation Service (the "county ASCS" or "the committee") of the United States Department of Agriculture. Plaintiffs had numerous outstanding CCC loans at the time the events that give rise to these claims occurred. Plaintiffs seek damages for the calling and delivery of corn loan collateral by the Agricultural Stabilization and Conservation Service (the "ASCS").

Regulatory framework

The Department of Agriculture directs price support, grain reserve and special producer loan programs available to agricultural products producers. 7 U.S.C. §§ 1281-1469 (1988); 15 U.S.C. § 714 (1988). The CCC funds the various programs, while the ASCS administers their day-to-day operations. The ASCS maintains and directs price support and production adjustment programs entitling producers to loans at the county, state, and national levels.

The Price Support, Grain Reserve and Special Producer programs, among other features, allow a producer to borrow money against grain which the producer then holds as collateral. 7 C.F.R. §§ 713.49(b), (c), 1421.1-30, 1421.90-100, 1421.740-755, 1421.900-917 (1987). Normally, a producer signs a loan contract that specifies the specific

rights and responsibilities of both the producer and the CCC. 7 C.F.R. §§ 713.49-50. By regulation the producer is required to provide the Government with lien waivers from all grain collateral lienholders.[1] 7 C.F.R. § 1421.10. Failure to comply with the terms of the contract subjects the producer to penalties and/or the calling (accelerated maturity) of loans. 7 C.F.R. §§ 713.49(d), 1421.6(d).

The county ASCS directs and administers the particular loan contracts and programs. Inspectors from county ASCS offices perform random checks on a producer's loan collateral in order to assure quality control. The county ASCS similarly checks whether any collateral is missing (unauthorized disposition). 7 C.F.R. § 1421.17(g). The county may, at any time in its discretion, call and/or order delivery of loan collateral. 7 C.F.R. §§ 1421.6(d).

Quality control problems

Between January 1982 (crop year 1981) and December 1987 (crop year 1986), plaintiffs stored corn in seven locations as collateral under 13 CCC loan contracts. Plaintiffs signed a "Farm Storage Grain Reserve Agreement" and a "Farm Storage Note and Security Agreement" ("FSNSA") in order to receive the contracts. The former provides, ***inter alia***, that the producer will not earn storage payments if the producer "negligently or otherwise impairs the commodity."

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[1] Lien waivers are not required if the lienholder executes a Lienholders Subordination Agreement. No such agreement exists in this case.

The FSNSA states the circumstances under which a producer will be held personally liable for the amount of a loan:

> (j) Loss in Quantity or Quality. The producer is responsible for any loss in quantity or quality of the commodity placed under farm-storage loan. . . . [P]hysical loss or damage occurring after disbursement of the loan funds will be assumed by the CCC . . . if the producer established to the satisfaction of the CCC . . . (1) the physical loss or damage occurred without fault, negligence, or conversion on the part of the producer or anyone else having control of the storage structure; (2) the . . . damage resulted from an external cause (other than insect infestation, rodents, or vermin. . . .

See 7 C.F.R. § 1421.15.

The county ASCS made periodic inspections of the corn to ensure freshness, coolness, and lack of weevil infestation. On May 6 and 11, 1987, the county ASCS inspected several of plaintiffs' storage sites. Inspectors noted quality control problems at seven storage locations:[2] 1) Moore farm flat storage, Contract No. 86-74-1 ("corn in west end moldy [with] weevil[s] [in] top 1-2 ft; south bulkheads marginal and bowed."); 2) Moore farm bin, Contract No. 85-350-1 ("mold/crust on north"); 3) Harold Gratz farm, only bin, Contract No. 84-28-1 ("mold on top; Jim should remove some of this corn. . . . ; crust covered area access."); 4) Harold Gratz farm middle bin, Contract No. 86-17-2 ("warm spot in center of bin

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[2] The ASCS inspectors had given "questionable" ratings to plaintiffs corn on three prior inspections.

. . . should be levelled or broken up with shovel."); 5) Harold Gratz farm east bin, Contract No. 85-23-1 ("weevils are heavy by door – no inside ladder – looks crusted on south side."); 6) Koesche farm small bin, Contract No. 81-166-2 ("moldy lumps still on top. . . . "); and 7) Koesche farm flat storage building, Contract No. 85-154-1 ("west 1/3 of shed [has] heavy weevil feeding [on] entire surface. . . . "). While the inspectors gave "questionable" ratings to two of these sites (Contract Nos. 84-28-1 and 85-23-1), they rated other sites as satisfactory despite these deficiencies.

By letter of May 19, 1987, county ASCS Executive Director Leon N. Wolfe advised plaintiffs of these deficiencies and requested that they redeem (exchange) 10,000 bushels from Contract No. 85-154-1 by June 18, 1987, to prevent spoilage. Mr. Wolfe also requested that plaintiffs redeem 200 to 300 bushels from Contract No. 84-28-1 and meet with the county ASCS to discuss these problems along with possible new crop rotation. The record does not indicate that plaintiffs ever redeemed the corn.

On May 26, 1987, Mr. Gratz met with the county ASCS. To address the committee's concerns, he presented a plan to redeem 4,000 bushels with certificates and rotate another 20,000 bushels. The county ASCS approved this plan, but reminded Mr. Gratz that "corn sold under rotation must be deposited . . . in [the] Reserve Rotation Fund [and] [a]s soon as new corn is in place and inspected by our office the amount of the original deposit will be reissued to you. . . . "

Relying on a chronological summary dated May 12, 1988, defendant claims that the county ASCS advised Mr. Gratz at the meeting that "rotation [could] . . . begin approximately August 1, 1987 *provided all necessary lien waivers are obtained*. . . . " (Emphasis added.)[3] Plaintiffs contend that they "were not informed of the . . . decision to require . . . lien waivers as a condition to replacing the corn until after delivery was completed." Plfs' Proposed Findings of Uncontroverted Facts No. 26, filed Oct. 28, 1991.[4] A June 8, 1987 confirming letter is silent on the issue. No document prepared contemporaneously with the May 26, 1987 meeting indicates whether the county ASCS notified plaintiffs of the lien waiver requirement.

The "Farm Storage and Security Agreement" signed by plaintiffs for each loan provided that "[t]he producer represents and warrants that . . . the collateral commodity is free and clear of all liens . . . except in favor of the lienholders from whom waivers have been secured. . . . "

On July 31, 1987, plaintiffs formally requested approval to rotate 20,000 bushels. On August 3, 1987, the county ASCS approved the request contingent upon

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[3] This summary is under the committee's letterhead. No indication of specific authorship is provided. To the extent that this summary alludes to events and meetings not independently corroborated in the record, the court does not rely on it as a basis for decision.

[4] The administrative record reflects that from October 1982 to October 1986. 13 lien waivers were filed on plaintiffs' behalf with the County ASCS listing liens held by Citizens National Bank, Darlington, Wisconsin.

receipt of any lien waivers. During a lien search conducted that same day, the county ASCS found two outstanding liens. While one lienholder, Citizens Bank, returned a completed waiver form to the county, ASCS on August 7, 1987, none was received from the other lienholder. Plaintiffs delivered 21,285 bushels of rotated corn between August 4 and August 22, 1987. On September 2, 1987, the other lienholder, Farm Credit Services, informed the county ASCS that it could not provide a lien waiver.

County ASCS personnel reinspected plaintiffs' corn on August 4, 1987. They noted some improvements: Contract No. 86-74-1 ("550 bushels removed . . . did not see weevils action on corn, but some on outside boards; no warm spots."); and Contract No. 85-23-1 ("little moldy crust on back side . . . rest looks good."). Other corn storage sites had little noticeable change (Contract Nos. 86-17-2, 81-166-2), while others had deteriorated (Contract Nos. 85-350-1 and 85-154-1). Nevertheless, inspectors inexplicably gave "satisfactory" ratings to all but one contract and upgraded one from "questionable" to "satisfactory."

Storage problems

Meanwhile, on June 18, 1987, the county ASCS notified plaintiffs that farm-stored corn Loans Nos. 18 and 74 would mature on July 31, 1987. The committee gave plaintiffs four options: 1) deliver the commodity to the CCC; 2) redeem the collateral by repaying the loan plus interest; 3) redeem the loan with earned or purchased commodity certificates; or 4) extend the loan for one year. On July 18, 1987, plaintiffs chose the last option.

In a July 30, 1987 letter, the county ASCS agreed to extend the loans, but informed plaintiffs that "before we can pay storage, we must have a statement in writing for the facilities that you do not own showing that you have use of these facilities for storage the next year."[5] Plaintiffs did not furnish the county ASCS with the requested statements.

On September 14, 1987, the county ASCS met in an executive session to consider the commodity loan program. The committee reviewed plaintiffs' matured loans, taking note of a court order "which may [have] prevent[ed] Jim Gratz from harvesting 1987 crops from a significant part of his 1987 corn acreage." Consequently, the committee decided to "hold up all 1986 final deficiency payments until matured loans [were] . . . delivered or settled and corn rotation problem [was] . . . settled."

The committee also noted three additional problem areas: 1) failure to provide proof of storage for an additional year; 2) financial inability to rotate (lien release on 1987 crop); and 3) continuing quality problems at several storage locations. Due to these problems, the committee decided to call all of plaintiffs' remaining corn loan grain reserve agreements.

On September 17, 1987, county ASCS personnel reinspected some of plaintiffs' corn. These inspections yielded results similar to those reported previously. Corn

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[5] An unsigned Commodity Loan Check Sheet states, as follows: "On storage facilities not owned by the borrower, producer must have signed rental agreements in our files before a loan will be approved. . . . "

at several storage locations was deteriorating (Contract No. 81-166-2), others had stabilized (No. 85-23-1), and still others had improved (No. 85-350-1). Again, the inspectors only rated one contract as questionable.

At a September 21, 1987 executive session, the county ASCS reviewed measurements of corn stored by plaintiffs under Contract No. 85-154-1. The committee discussed a 5,000-10,000 bushel shortfall in corn stored and determined that the shortage was an unauthorized disposition of loan collateral in violation of the Farm Storage Note and Security Agreement. Consequently, the county ASCS reaffirmed its earlier decision to issue delivery notices on the three matured 1986 loans for which plaintiffs had requested extensions and to call all remaining loans.

By letter of September 23, 1987, the county ASCS informed plaintiffs of the unauthorized disposition determination. The letter explained that "the maturity date on your loan has been accelerated and liquidated damages . . . will be assessed on the quantity disposed of without authorization." Plaintiffs were given ten days to repay the loan and applicable penalties.

By separate letter of the same date, the county ASCS notified plaintiffs of the calling of their 1982, 1984, and 1985 corn loans "because of loss of storage space and continuing corn quality problems." This letter also requested delivery of plaintiffs' matured 1986 loans. Plaintiffs were given ten days before actual delivery was required on the 1982, 1984, and 1985 loans. Neither letter informed plaintiffs of appeal rights.

On October 13, 1987, the county ASCS sent plaintiffs delivery notices for the remaining corn loans. The letter

set forth plaintiffs' responsibilities to "monitor grade and quality from each truck load" of corn delivered to the federal warehouse. However, in an October 15, 1987 executive session, the county ASCS noted that "Mr. Gratz has not cooperated with the warehouseman in loading out corn under delivery notices. . . . [U]sually [the Gratzs] were not around. . . . "

By October 27, 1987, plaintiffs still had not provided rental statements for those storage sites which they did not own. As a result the county ASCS resolved "to take action to complete the deliveries of all [such] remaining corn." The committee notified plaintiffs by letter dated November 19, 1987, that the ASCS "has decided to arrange for delivery of corn stored at" the Moore cattle shed, the machine shed at the former Koesche farm, and two bins at the Koesche farm. The committee gave plaintiffs until December 1, 1987, to comply with this delivery order.

Mr. Gratz met with the county ASCS on December 14, 1987. He told the committee that he still owned the Moore farm and that he would negotiate with the owner of another storage bin for continued corn storage. He also mentioned that he had access to another bin at the Tuescher farm. The record does not indicate whether plaintiffs ever supplied the ASCS with rental agreements from these individuals.

The committee reconvened on December 18, 1987, to review bin measurements and corn samples. The committee again determined that the corn in the two flat storage facilities was heating and crusting. On January 6, 1988, the county ASCS decided to issue delivery notices on that

corn due to unauthorized disposition, corn quality, passed due maturity dates, and lack of storage agreements. The committee informed plaintiffs in a subsequent letter that they had a right to appeal its decision. On January 13, 1988, plaintiffs appealed the committee decision in a one-paragraph letter.

At a January 26, 1988 meeting the county ASCS discussed plaintiffs' appeal. In particular the committee reviewed the quality of plaintiffs' corn delivered to warehouses pursuant to the calling of their loans. The Moore farm corn was musty and sour, and the Koesche farm corn had significant water damage. Despite these problems the committee agreed to reinstate plaintiffs' loans for corn on the Harold Gratz and Estate farms. The committee, however, did order the corn in the large bin at the Koesche farm "delivered due to questionable quality and lack of control of storage structure." A contemporaneous notification letter to plaintiffs informed them of their appeal rights.

On February 10, 1988, the county ASCS informed plaintiffs that an additional shortage of corn had been discovered at the West bin at Ed's Dairy. The committee determined that this shortfall was unauthorized disposition of loan collateral. The committee further noted that quality problems continued at the Koesche farm machine shed and at the Moore farm. Finally, the committee discovered that plaintiffs had refused to allow McKenna grain to remove corn from the Koesche farm's large bin pursuant to delivery notices. Consequently, the committee decided to recall all of plaintiffs' remaining corn under loan. The committee accorded plaintiffs ten days to

repay the loans before it would issue delivery notices. Plaintiffs had 15 days to appeal the decision.

On February 22, 1988, plaintiffs, through counsel, wrote to the county ASCS requesting, ***inter alia***, that the committee rescind the unauthorized disposition determinations. On March 8, 1988, the county ASCS heard plaintiffs' appeal. On March 14, 1988, the committee declined to change the unauthorized disposition determination finding, but allowed plaintiffs to redeem 5510 bushels toward the corn shortfall. Again, the committee informed plaintiffs of their appeal rights to the state ASCS.

The state appeal

Plaintiffs appealed the county ASCS decision to the Wisconsin State ASCS Committee. On April 4, 1988, the state committee heard plaintiffs' appeal. On April 12, 1988, the state ASCS affirmed the county ASCS' decision to call all loans due to quality problems and plaintiffs' failure to provide written lease agreements for those storage areas that they did not own. The state committee also informed plaintiffs that it would restore their loans for corn stored on the Harold Gratz farm if a written lease was turned in within two weeks. The state committee reversed the county ASCS decision as to unauthorized disposition. The state appeal decision letter also informed plaintiffs of their appeal rights.

On April 13, 1988, the county ASCS assessed the state ASCS' action. The committee decided that corn from the large storage bin at the Koesche farm should be delivered within ten days. Consistent with the state ASCS decision,

the county ASCS required that plaintiffs furnish an official lease for the Harold Gratz farm in order to have those loans restored.

When by April 27, 1988, plaintiffs had not begun the required delivery from the Koesche farm or supplied a lease agreement for the Harold Gratz farm, the county ASCS decided to begin delivery on the Morissey (presumably the Koesche) farm. The committee allowed plaintiffs time to supply a written lease for the Harold Gratz farm. Plaintiffs proffer a handwritten note dated May 12, 1988, signed by Harold Gratz purporting to lease bins at the Harold Gratz farm for 1988).

The state ASCS wrote plaintiffs in early May 1988 in response to plaintiffs' request to rescind the Morissey farm delivery notices. Plaintiffs presented a written lease for the farm storage, and the ASCS rescinded the calling of those particular loans.

On July 12, 1988, plaintiffs appealed the state ASCS decision to the Deputy Administrator, State and County operations (the "DASCO"). On November 23, 1988, the DASCO concluded that "the county committee acted properly within its delegated authority. . . . " However, the DASCO restored any loan which "was not called due to deteriorating condition." Despite a December 22, 1988 letter reminding plaintiffs of their right to reinstate certain loans, the record does not indicate plaintiffs' exercising those rights.

Plaintiffs commenced an action in the Claims Court seeking damages in the amount of $315,272.17 representing the alleged value of the corn delivered to the ASCS.

DISCUSSION

Although the plaintiffs raise eight issues, the central issue is whether the ASCS acted rationally and within its statutory authority when it called and delivered plaintiffs' grain collateral.

1. Limited judicial review

A court has limited authority to overturn administrative factual determinations. ***Willson v. United States***, 14 Cl. Ct. 300, 304 (1988). Its duty is to " 'scrutinize whether the officials acted rationally and within their statutory authority.' " ***Id.*** (quoting ***Raines v. United States***, 12 Cl. Ct. 530, 536 (1987) (citations omitted)). An agency's legal determinations may be reviewed for arbitrariness and capriciousness. ***Gross v. United States***, 205 Ct. Cl. 605, 618, 505 F.2d 1271, 1279 (1974). The administrative record constitutes the only acceptable source for this court's review. ***See Willson***, 14 Cl. Ct. at 304.[6]

2. Substantive due process

Plaintiffs initially contend that the ASCS denied them their substantive due process rights: 1) by calling loans due to quality control problems when county inspectors

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[6] Plaintiffs allege that "certified administrative record is incomplete." Plfs' Counter Statement of Facts, filed Jan. 15, 1992, at 1. However, the administrative record is the sole source for the purpose of the court's review of the ASCS and DASCO decisions. This court must defer to the agency's factual findings that are contained in the administrative record. ***Willson***, 14 Cl. Ct. at 304 (citing 7 U.S.C. §§ 1385, 1429 (1982)).

had rated most of the contracts as "satisfactory;" (2) by requiring proof that plaintiffs had sufficient storage space specifically leased in their names; and (3) by requiring lien waivers on the corn collateral.

7 C.F.R. § 1421.6(d) (1987), provides, in pertinent part, that the "CCC may, *at any time*, accelerate the tme for repayment of a price support loan indebtedness." (Emphasis added.) Thus the county ASCS and DASCO have the regulatory authority to call loans subject only to a court's determination of whether such a decision is arbitrary or capricious. *See Gross*, 205 Ct. Cl. at 618, 505 F.2d at 1279.

Plaintiffs claim that the county ASCS made an arbitrary decision by disregarding the inspection reports of its own inspectors. Plaintiffs also assert that the Government inspectors did not grade the inspected corn according to Federal Grain Inspection Service ("FGIS") standards. Plaintiffs argue that the ASCS could only reject the corn if inspectors had graded it "sample".

The court recognizes that 7 C.F.R. §§ 1421.92, 1421.748, 1421.909, state that corn quality determinations shall be based on FGIS standards *i.e.*, U.S. Nos. 1-5 or U.S. Sample grade, derived by determining the percentage of damaged kernels, broken corn, and foreign material per bushel. 7 C.F.R. §§ 810.402, 810.404. By contrast, however, Farm Storage Loan worksheet form 677-1, used by the county committee to record and evaluate grain amounts and quality, provides for a "satisfactory" or "questionable" rating followed by a space for inspectors' remarks. It is unclear whether the ASCS inspectors used FGIS criteria in assessing plaintiffs' corn.

The written comments on the worksheets describe in detail weevil infestation and crusting problems. Later evaluations prepared by the county committee noted excessive moisture problems and, in some cases, complete destruction of portions of plaintiffs' corn. While this court considers that an inspection form more closely conforming to the FGIS criteria would have been preferable, it is apparent in this case that the inspectors' Form 677-1 reports were sufficiently comprehensive to provide the DASCO with a rational basis for affirming the county committee's decision to call plaintiffs' loans due to quality concerns.[7]

County ASCS inspectors gave satisfactory ratings to many of plaintiffs' corn collateral contracts. However, at the same time, the inspections revealed quality problems at most corn collateral locations. As noted, county ASCS inspectors made detailed notations describing weevil infestation, crusting, heating, and water damage. The county ASCS found the initial May 1987 inspections serious enough to warrant asking Mr. Gratz to meet with the committee. Thus, the county ASCS did not disregard its own inspectors' reports. Rather, the committee acted

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[7] Even were this court to hold that the ASCS acted inconsistently with the provisions of the CCC Charter Act by not conforming to the applicable FGIS quality regulations, plaintiffs would not prevail. The inspectors' reports satisfactorily appraised the condition of plaintiffs' corn. From May 26, 1987, plaintiffs were on notice of these problems and seemingly never addressed them. Finally, in their briefs before this court, plaintiffs only take issue with the committee's disregarding their own inspectors' reports. *eg.*, Pfs' Br. filed Jan. 13, 1992, at 5, not the criteria used to prepare those reports.

on the totality of those inspections, looking beyond the "satisfactory" rating.

"[Q]uestions as to grain quality . . . are peculiarly within the expertise of the local, state and federal officials who are in charge of the ASCS price support programs." ***Frank's Livestock & Poultry Farm v. United States***, 17 Cl. Ct. 601, 606 (1989), ***aff'd***, 905 F.2d 1515 (Fed. Cir. 1990). Given the statutory authority to call loans (7 C.F.R. § 1421.6(d)) and the ASCS inspectors' detailed quality notations, this court cannot conclude that the county ASCS or the DASCO acted arbitrarily in calling plaintiffs' loans, even though the inspectors rated the grain satisfactory in most cases.[8]

This court similarly cannot rule that the ASCS committee acted arbitrarily when it required plaintiffs to submit lease agreements demonstrating adequate storage space for the upcoming year. No specific regulation mandates such agreements. However, requiring participants in the grain reserve program to submit lease agreements must be viewed in context. Plaintiffs needed adequate storage space to protect government property, the corn collateral. Even if plaintiffs experienced no quality problems to this point, the ASCS acted well within its authority to require lease agreements. Farmers in the grain

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[8] Plaintiffs argue that the ASCS is estopped from calling its loans because the county ASCS was not authorized to disregard the reports of its own inspectors. Plaintiffs ignore the totality of the inspectors' findings – to wit, although every inspection noted some kind of quality problem. The ASCS committee, moreover, notified plaintiffs of its concerns early on. Indeed, over three months passed before the county ASCS took any action to call plaintiffs' loans.

reserve program store government property; a requirement that farmers assure storage availability to the Government's satisfaction is both rational and appropriate.

Plaintiffs also charge that the ASCS committee effectively prevented corn rotation by requiring lien waivers. The record does not indicate whether the committee informed plaintiffs of this requirement contemporaneously with the tentative May 26, 1987 rotation approval. The ASCS committee's June 8, 1987, letter memorializing the May 26, 1987 meeting with Mr. Gratz does not mention the waiver requirement.

Plaintiffs argue that this lack of notice violated their substantive due process rights. The facts militate against such a conclusion. The "Farm Storage and Security Agreement" signed by plaintiffs for each loan contract provides that "[t]he producer represents and warrants that . . . the collateral commodity is free and clear of all liens . . . except in favor of the lienholders from whom waivers have been secured." Furthermore, 7 C.F.R. § 1421.10 states: "[I]f there are any liens or encumbrances on the commodity, waivers . . . must be obtained." Finally, from 1982 to 1986, lien waivers for plaintiffs' corn had been submitted numerous times.[9] At the very least, plaintiffs had constructive notice of the lien waiver requirements and the ASCS had the regulatory authority to require them.

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[9] One Farm security Note lists Citizens Bank as the payee on the loan.

3. **Procedural due process**

Plaintiffs contend that the ASCS violated their procedural due process rights by failing to notify them of their rights to appeal the calling of various loans before beginning corn delivery to warehouses. Assuming, ***arguendo,*** that the Claims Court can entertain such constitutional claims, plaintiffs' contentions are meritless.

Plaintiffs essentially argue that procedural due process required the county ASCS to give them an appeal hearing before calling the loans and ordering delivery of their corn. 7 C.F.R. § 780 articulates a producer's appeal rights after an adverse decision by the county ASCS. These regulations entitle the producer to an initial reconsideration by the county ASCS and appeals thereafter at the state and national levels. 7 C.F.R. §§ 780.3-5. The regulations do not prescribe that appeal hearings occur before the ASCS calls or orders delivery on grain collateral. "[S]ubsequent hearings provided at the county, state and federal levels satisfy any applicable due process requirement." ***Frank's Livestock and Poultry,*** 17 Cl. Ct. at 606 ***aff'd,*** 905 F.2d at 1518.

Beginning in January 1988, plaintiffs appealed the county ASCS' decision at every level. They were thus able to present their position on administrative review regarding the county ASCS' decision. Furthermore, plaintiffs received correspondence from the county ASCS numerous times and met informally with the county committee on several occasions. Thus, plaintiffs cannot claim that they did not understand the basis for the ASCS's findings.

4. **Unconstitutional taking**

Plaintiffs assert that they had "a property right to the liquidated contracts." Plfs' Br. filed Oct. 28, 1991, at 20. They contend that DASCO unconstitutionally liquidated these property rights by allowing the Government to use proceeds from the delivered corn for its own benefit. It has been established that the ASCS/DASCO acted rationally and within their authority in calling plaintiffs' loans.

A taking can occur only when the Government acts in its sovereign capacity. ***Sun Oil v. United States,*** 215 Cl. Ct. 716, 770, 572 F.2d 786, 818 (1978). When the government "enters the domain of commerce . . . this represents activity by it in a proprietary [rather than] . . . a sovereign capacity." ***Id.*** The Government's actions do not constitute a taking.

Plaintiffs entered into a contract with the ASCS under the auspices of the CCC and the Department of Agriculture. The Government loaned plaintiffs money in exchange for plaintiffs' promise to repay and store sufficient collateral to cover the loan. This transaction is a classic illustration of the Government's acting in a proprietary capacity. Each side incurred rights and responsibilities. Plaintiffs' sole remedy is a breach of contract action.

5. **Unconstitutional regulation**

Plaintiffs argue that 7 C.F.R. § 1421.748(d) is unconstitutionally vague because it fails to specifically list under what conditions a county committee can overrule

the decisions of its own inspectors. In ***Frank's Livestock and Poultry,*** a producer denied entry into the CCC price support program complained that the ASCS failed to follow the language of 7 C.F.R. § 1421.748(d). the Federal Circuit held that the ASCS' interpretation of the regulation was reasonable and that the factual findings at issue were, in any case, unreviewable. 905 F.2d at 1517.

The regulation in question is specific and easily understood. The county ASCS exercised its authority under 7 C.F.R. § 1421.748(d) and other provisions of the regulation to assure that loan collateral would not deteriorate to the Government's detriment. The county committee consistently and specifically explained to plaintiffs that the quality of their corn was unacceptable. Any lack of notice or vagueness arose out of plaintiffs' inability or unwillingness to conform their corn collateral to the standards required by the county ASCS.

CONCLUSION

Based on the foregoing, plaintiffs' motion for summary judgment is denied, and defendant's cross-motion is granted. The Clerk of the Court shall dismiss the complaint.

IT IS SO ORDERED.

No Costs.

/s/ CC Nettesheim
Christine Cook Nettesheim
Judge

STATEMENT OF ISSUES

Pursuant to Fed R. App. P. 10(b)(3), Appellants hereby submits this statement of issues for the appeal.

(1) Did the Claims Court err in granting Appellee's motion for summary judgment on Gratzes' claims on the following issues?

a. Procedural due process;

Whether the agency's post-termination process which occurred after the Gratzes' property rights were liquidated, coupled with the agency's violations of its own regulatory due process procedures, precludes the application of the *Parratt-Hudson* exception to a meaningful prior notice and hearing?

b. Substantive due process;

Did the agency issue an arbitrary decision(s) when it ignored its own inspectors overall gradations or when DASCO reinstated Gratzes while not finding any quality problems which resulted in a denial of actual reinstatement?

c. Unlawful taking;

Whether Appellee's actions of taking the grain and confiscating the contracts were conducted within its sovereign or proprietary capacity?

* * *

IN THE UNITED STATES CLAIMS COURT

James L. Gratz and Therese Gratz,
Plaintiffs,

FILE NO.
91-1107 C

vs.

The United States,
Defendant.

PLAINTIFFS' PROPOSED FINDINGS OF UNCONTROVERTED FACTS

1. Plaintiffs James L. Gratz and Therese Gratz (hereinafter "Gratzes") are husband and wife, who engage in farming and are presently residing at 10731 Golf Course Road, Darlington, Wisconsin 53530.

2. Defendant The United States (hereinafter "Government") is the United States of America in its sovereign capacity and the following officials: the Secretary of Agriculture, the Administrator of the Agriculture Stabilization and conservation Service (hereinafter "ASCS"); the Lafayette County ASCS Committee (hereinafter "County ASCS"); the County Executive Director for the County ASCS (hereinafter "CED"); the State of Wisconsin ASCS State Committee (hereinafter "State ASCS"); and the Acting Deputy Director of the State and County ASCS programs (hereinafter "DASCO").

3. Gratzes were participants in Commodity Service Programs with the United States Department of Agriculture under the Agricultural Act of 1949.

4. Defendant's Answer admits that the documents attached or reference in Plaintiffs' Amended complaint, support or may support the facts asserted in paragraphs 5, 6, 8, 9, 10, 11 12, 14, 23, 24, 25, 26, 28, 29, 31, 33, 34, 36, 37, 38, 39, 40, 41, 42, and 43.

5. For the claims material herein, Gratzes were participants in either the grain reserve storage or reserve loan programs beginning prior to 1982. (V. Comp. ¶ 5).[1]

6. Gratzes had 10 contracts with the Lafayette County ASCS under the grain reserve storage program on May 11, 1987. *Id.*

7. Gratzes had 3 contracts with the Lafayette County ASCS under the regular loan program as of May 11, 1981. *Id.*

8. The LaFayette County ASCS committee hired inspectors to determine the quality of the grain under the regular loan and grain storage programs and facilities in which they were placed. (V. Comp ¶ 7).

9. Gratzes' grain was inspected by Mr. Dale Symons and other persons as designated inspectors by the LaFayette County ASCS. *Id.*

10. Over 130 inspections were conducted by the county's designated inspectors, out of which, only three

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[1] "V. Comp." refers to Plaintiffs' verified Complaint and Amended Complaint. The only changes between the pleadings were typographical or clerical. "Exhibit" refers to the documents attached to the verified Complaint and Amended Complaint.

such inspection found the quality of the grain as "questionable". (V. Comp ¶ 11).

11. The three "questionable" findings were as follows:

(a) On August 12, 1985, grain stored under contract No. 85F (No. 84-97-2) was graded as "questionable". (Exhibit 24D). However, on August 19, 1985, and at all times thereafter it was graded as "satisfactory". (Exhibits 24D-24E).

(b) On August 19, 1985, grain under contract No. 85F (84-97-1) was graded as questionable. (Exhibit 24D). For each and every inspection after August 19, 1985, Gratzes' corn stored under this contract was graded as "satisfactory". (Exhibit 24D).

(c) On May 11, 1987, grain stored under contract No. 517F (85-23-1) graded that the commodity was "questionable." (Exhibit 24D). In the very next inspection of August 4, 1987, the County ASCS's appointed inspector graded the grain as satisfactory. (Exhibit 24D).

12. Pursuant to regulation when either the grain or storage facilities received an unacceptable grading, the County ASCS is required to give the producer written notice and at least 30 days to correct the condition. Part 2, ¶ 78 1-LP (Rev. 5). (Exhibit 24H). The County ASCS is to determine on its next inspections whether the producer's grain is in a satisfactory condition. *Id.*

13. In each of the three cases cited above, Gratzes' grain was graded as "satisfactory" in the very next

inspection and at all times material thereafter (V. Comp. ¶ 9; Exhibits 24-24G).

14. On May 19, 1987 the county notified Gratzes of its concern over the quality of Gratzes' grain. (Exhibit I).

15. In the May 19, 1987 letter the county executive director cited quality problems at "several" locations. *Id.*

16. The record below shows that the only grain contract to currently have a questionable rating was the one stored under contract 85-23-1 (No. 517F) which was inspected on May 11, 1987 (V. Comp. ¶ 11).

17. At every subsequent inspection of contract 85-23-1 (No. 517F) the grain was graded "satisfactory" (V. Comp. ¶ 9).

18. In its May 19, 1987 letter to Gratzes, the County ASCS did not give written notice that Gratzes had the right to correct the grain receiving the "questionable" rating within 30 days as mandated by internal rules Part 2, ¶ 78, 1-LP (Rev. 5) (Exhibit 24H).

19. In an attempt to work out the situation, Gratzes [not being informed of their 30 day right to correct the problem and relying upon the County ASCS's written representations that "several" grain contracts received a "questionable" inspection rating] agreed to rotate (meaning replace with acceptable corn) grain stored under contract 82-138-1 (No. 18F). (Exhibit 67).

20. At all times material, the grain stored under contract 82-138-1 (No. 18F) (Exhibit 24A) was graded "satisfactory."

21. The parties memorialized the understanding reached in a June 8, 1987 letter (Exhibit 68) that stated in part:

> As soon as new corn is in place and inspected by our office the amount of the original deposit will be reissued to you and or lienholder in case of liens on crops.

22. The June 8, 1987, letter (Exhibit 68) did not inform Gratzes of their appeal rights afforded under internal rules Part 2, ¶ 78, 1-LP (Rev. 5) or rights to appeal a decision under 7 C.F.R. pt. 780.

23. Nonetheless, the rotation requested of grain stored under contract (82-138-1) was approved by the County ASCS on August 3, 1987. (Exhibit 67).

24. Gratzes delivery of the rotated corn was completed on August 21, 1987. (Exhibits 71-72).

25. According to the chronological summary of events of Gratzes' case prepared by an authorized person in the County ASCS, in an executive meeting on August 3, 1987, the County ASCS decided that the rotation would be conditional on obtaining lien waivers. (Exhibit 173).

26. Gratzes were not informed of the County ASCS's decision to require these lien waivers as a condition to replacing the corn until after delivery was completed (V. Comp. ¶ 22).

27. When the money for the proceeds for delivered corn was payable to Gratzes, pursuant to the June 7, 1987 letter, it was only then that the ASCS made a representation (for the first time) that Gratzes were required to have a lien waiver (V. Comp. ¶ 22).

28. A lien waiver is not required by regulation and this new (previously undisclosed) requirement was contrary to the written representations by the County ASCS on June 8, 1987. (Exhibit 24H).[2]

29. Gratzes were unable to satisfy the county's new condition and lost their property right to place the rotated corn in the reserve storage program. (V. Comp. ¶ 22).

30. Gratzes lost their right to keep this grain within the reserve storage program and collect the benefits therefrom. *Id.*

31. Without a prior notice or hearing the County ASCS, on September 23, 1987, revoked Gratzes' interests in the remaining 1982, 1984 and 1985 grain reserve storage contracts, and refused to allow them the right to continue in their 1986 regular loans or to placed said loan corn into the grain reserve storage program, as provided by regulation 7 C.F.R. § 1421.743. (Exhibit 75).

32. The Lafayette County ASCS cited quality problems and an alleged unauthorized disposition of corn. *Id.*

33. The County ASCS did not inform Gratzes of their right to appeal their decision as mandated by internal rules ¶ 16, part 2, 3-CP; 7 C.F.R. part 780. (*Id*; Appx p. 18).

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[2] V. Comp. ¶ 21 cites this regulation incorrectly as 1-LP (Rev. 5) Part b. § 326, Exhibit 24H. This should be corrected to read 1-LP (Rev. 5) Part b. ¶ 326. This regulation is attached as Exhibit A, to Aff. of Pinotti. Appx. p. 8.

34. As of Sept 23, 1987 *none* of the Gratzes' grain in storage facility was currently graded as questionable by the inspectors hired by the county (Exhibit 24-24G, V. Comp ¶ 9).

35. Accompanied with the County ASCS September 23, 1987 letter were several delivery notices, form CCC-691 demanding immediate delivery. (Exhibits 77-79 & 82-85).

36. The County ASCS's allegation of an unauthorized disposition of grain was not upheld by the State or DASCO (Exhibits 150-152 & 169).

37. The County ASCS's allegation of continuing corn quality problems was not supported by the State ASCS or the DASCO in their final decisions. *Id.*

38. Beginning on September 30, 1987 and continuing through October 13, 1987 the County ASCS took 41,282 bushels of corn from Gratzes. (V. Comp. ¶¶ 27-29).

39. On January 5, 1988, in spite of not sending the notice of appeal, the County ASCS confirmed the liquidation on the following loans: 1982 loan No. 18; 1985 loan No. 520; and 1986 loan No. 8, 30, and 79. (Exhibit 100).

40. Again on January 8, 1988, the County ASCS revoked Gratzes' participation in the grain reserve storage program in the years in question, based on (the again false premise that) the quality of the corn was questionable. (Exhibit 107).

41. The County ASCS specifically cited a date that heating and crusting was allegedly found on December 17, 1987. (Exhibit 102). The inspection sheets on the same date indicate that the County ASCS's inspector fully

agreed that the quality of the corn and storage facilities were *satisfactory*. (Exhibits 24C-24G).

42. The first time that Gratzes were informed of their rights to appeal was in a separate County ASCS letter to Gratzes dated January 8, 1988. (Exhibits 102-103).

43. By January 8, 1988, several storage contracts and reserve loans had been liquidated by the Defendant's actions, failure to properly notify Gratzes of their absolute right to appeal the County ASCS's decision(s), and the Government's failure to allow Gratzes to exhaust their rights before implementing procedures to take possession of the collateral (V. Comp. ¶ 35).

44. Gratzes appealed the January 8, 1988, decision to the County ASCS on January 13, 1988, which was received by the County ASCS on January 22, 1988. (Exhibit 105).

45. Despite receiving Gratzes' timely notice of appeal, the County ASCS between the dates of January 19, 1988, and January 22, 1988, took 31,856 bushels of corn, according to receipts Grazes received from McKenna Grain Elevator Co. (Exhibits 109A & 109B).

46. Gratzes first hearing regarding the called loan agreements of September 23, 1987 and January 8, 1988 occurred on January 26, 1988. (Exhibits 106-109). This hearing was 4 days after all grain had been delivered, pursuant to Defendant's letters of September 23, 1987 and January 8, 1988.

47. The State ASCS issued its first decision on April 12, 1988. (Exhibit 138).

48. On April 12, 1988, the State ASCS only cited grain stored under one contract (No. 85F) on the Morrissey (Koesche) farm (Exhibit 24D) as being of poor quality. (Exhibit 139). This quality determination relative to the grain stored on the Koesche farm was reversed by the State ASCS themselves on May 13, 1988. (Exhibit 152).

49. As a result of the State ASCS's decision of April 12, 1988, modified by the May 13, 1988, decision, *all* of Gratzes' grain was determined to be graded satisfactory.

50. Defendant admits that the State ASCS did inextricably find that the County ASCS acted within their authority when they called the loans. (Answer ¶ 41).

51. The DASCO rendered a decision on November 23, 1988. (Exhibit 169).

52. The DASCO did not find that *any* of the corn was of poor quality, yet it found that the "The county committee acted appropriately and within its authority when it called the subject loans; however, *your loans may be reinstated provided*" when certain conditions were met. (Exhibit 169).

53. By the time the DASCO authorized reinstatement of Gratzes interests in the storage contracts and reserve loans, it was too late. It was impossible for Gratzes to meet the conditions for reinstatement because the collateral had been confiscated pursuant to the Government's unlawful actions and demands as stated herein above. (V. Comp. ¶ 44).

54. The postdetermination process was meaningless because the grain stored under the reserve storage contracts and reserve loans were liquidated prior to Gratzes

receiving the mandatory notice of right to appeal or being allowed to appeal.

55. Gratzes have been damaged in the sum of $255,601.56, plus interest of $59,670.61. (Exhibits 180-194).

56. Gratzes' interests have yet to be reinstated. (Exhibit to Aff. of T. Gratz).

RESPECTFULLY SUBMITTED,

MICHAEL A. PINOTTI, LTD.

/s/ Michael A. Pinotti
Michael A. Pinotti
Attorney for Plaintiff
Suite 830, Rosedale Towers
1700 West Highway 36
Roseville, Minnesota 55113
(612) 633-1039
Registration No. 130400

Dated: Oct. 26. 1991

3-CP [Internal Regulation]

PART 1 PURPOSE AND APPLICABILITY

1 HANDBOOK PURPOSE

This handbook:

A Provides uniform procedures for COC's, STC's, and DASCO to:

1 Handle program appeals and complaints of discrimination by producers or program participants.

2 Ensure producers or program participants are afforded their legal rights to pursue an appeal.

B Describes a process by which COC's and STC's can gather all the facts necessary to render and document a proper decision involving an adverse determination.

2 HANDBOOK APPLICABILITY

This handbook applies to the following:

* * *

C CCC loan and purchase programs including FFLP. See paragraph 3 C for exception.

* * *

3 MATTERS NOT APPEALABLE UNDER THIS HANDBOOK

The following matters are not appealable under this handbook:

* * *

B U.S. grain standard grade determinations made under the CCC loan and purchase programs.

* * *

16 PROGRAM DETERMINATIONS

Any initial program determination listed in paragraph 2 shall contain written notification of the producer's rights to appeal. Notification shall contain the:

A Name and address of the reviewing authority to whom the appeal must be sent.

B Appeal requirements. See paragraph 18.

C Time limitation. See paragraph 19.

* * *

18 REQUESTING AN APPEAL

A The appellant or authorized representative shall:

1 Submit a WRITTEN request as to appeal the determination. See Exhibits 4 and 5.

2 Sign the request.

3 Include in the request:

a Reasons why he or she believes that the determination was improper.

b The nature of the requested action.

B County Office employees shall not prepare requests for producers, unless a producer cannot perform this task.

19 TIME LIMITATIONS FOR FILING REQUESTS FOR RECONSIDERATION OR APPEALS

A A person must file within 15 days after the letter of determination is mailed or otherwise made available. Request for reconsideration or appeal shall be considered "filed" when:

1 Personally delivered.

2 Postmarked, if mailed.

Lafayette County ASCS Office
P.O. Box 190
Darlington, Wisconsin 53530

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

May 19, 1987

James and Therese Gratz
10731 Golf Course Road
Darlington, Wisconsin 53530

Dear Mr. & Mrs. Gratz:

Recently all your bins and sheds storing corn under CCC loan were spot checked. Quality problems exists at several locations. The county committee reviewed these at their meeting of May 13, 1987.

Moore Farm – Flat Storage – West end is moldy on top with weevils present. Also commented that the south bulkheads are marginal and bowed. I have noticed that the east end is also dangerously bowed.

Moore Farm – Bin – Crust on north side.

Harold Gratz Farm (where you live) – Only Bin – Moldy on top. Crust covered the area that could be accessed. Suggest you redeem 200 to 300 bu. and remove it from this bin.

Harold Gratz Farm – Ed's Dairy – Middle Bin – Warm spot in center of bin under the spout. Should be leveled or broken up with a shovel.

Harold Gratz Farm – Ed's Dairy – East Bin of 3 – Weevils by door. Crusted on south side. Treat for weevils and break up the crust.

Koesche Farm – Small Bin – Still some moldy lumps left on top. Suggest you remove them. Are good weevil habitat.

Koesche Farm – Large flat storage building – Quality of corn in the west end of this building is not good. Because of poor quality you still have heavy feeding by weevils especially in the top 2' of corn. Corn is cool – no heating going on – but the weevils will continue to diminish the quality of corn in this building. The committee decided on May 13, 1987 that you should redeem at least 10,000 bu. and remove it from the top west end of this building in the next 30 days or by June 18, 1987.

The county committee also requests that one or both of you meet with them at their meeting on May 26, 1987. They wish to discuss with you the quality of corn you have under loan, rotation with new crop corn this fall and the 10,000 bu. redemption listed above.

Call us at you convenience so that we can schedule you on the Committee agenda for May 26th at a time that best suits you.

Sincerely,
/s/ Leon N. Wolfe
Leon N. Wolfe
County Executive Director

STATUS OF ALL JAMES GRATZ OUTSTANDING LOANS ON May 11, 1987

Cr. Yr.		Old #	New #	Bushels	Principal	Maturity
1982	Special Producer	#13F	#22	8,340 bu.	$24,186.00	11/30/87
1982	Special Producer	#45F	#20F	14,424 bu.	$41,829.60	11/30/87
1982	Special Producer	#138F	#18F	628 bu.	$ 1,821.20	2/28/88
1984	Grain Reserve	# 28F	#84F	14,192 bu.	$36,047.68	8/31/88
1984	Grain Reserve	# 97F	#85F	21,933 bu.	$55,709.82	9/30/88
1985	Grain Reserve	# 23F	#517F	6,388 bu.	$16,225.52	7/31/89
1985	Grain Reserve	#154F	#518F	37,128 bu.	$94,305.12	8/31/89
1985	Grain Reserve	#222F	#519F	5,330 bu.	$13,538.20	9/30/89
1985	Grain Reserve	#350F	#520F	1,245 bu.	$ 3,162.30	2/28/90
1985	Grain Reserve	#354F	#522F	1,741 bu.	$ 4,422.14	2/28/90
1986	Regular Loan	# 18F	# 9F	6,190 bu.	$11,314.52	7/31/87
1986	Regular Loan	# 74F	#30F	20,745 bu.	$37,919.16	7/31/87
1986	Regular Loan	#301F	#79	12,264 bu.	$22,416.76	8/31/87
				150,548 bu.	$362,898.02	

Lafayette County ASCS Office
P.O. Box 190
Darlington, Wisconsin 53530

June 8, 1987

James and Therese Gratz
10731 Golf Course Road
Darlington, Wisconsin 53530

Dear Mr. & Mrs. Gratz:

Thank you for taking time to meet with the County Committee to review the quality of corn you have under CCC loan.

The committee did agree with your plan to redeem another 4000 bu. with certificates and rotate about 20,000 bu. Rotation can be approved to start moving corn August 1, 1987. As mentioned at that meeting, you will have to still apply for rotation when you know more specifically how much you want to sell and at what time periods after August 1, 1987.

All proceeds for corn sold under rotation must be deposited at the county office in Reserve Rotation Fund. As soon as new corn is in place and inspected by our office the amount of the original deposit will be reissued to you and or lienholder in case of liens or crops.

Also is very important that you keep good records of the amount of corn you are using for feed as well as providing us settlement sheets for all corn sold under rotation authorization.

Call us if you have any questions.

Sincerely,

/s/ Constance J. Heins
acting CED
Leon N. Wolfe
County Executive Director

LW/ch

UNITED STATES DEPARTMENT OF AGRICULTURE
Agricultural Stabilization
and Conservation Service
Lafayette County ASCS Office
P.O. Box 190
Darlington, Wisconsin 53530
Telephone: 608-776-4028

July 30, 1987

James Gratz & Therese Gratz
10731 Golf Course Road
Darlington, Wis. 53530

Dear Mr. & Mrs. Gratz:

According to our records you have requested a one year extension on two 1986 corn loans which mature tomorrow, July 31, 1987.

The extension forms are enclosed for completion by both of you. Please sign and date where checked in red then return promptly to our office.

Our records also show an anniversary date for storage payment on 1985 Grain Reserve corn loan #23F due July 31, 1987. This loan covers 6388 bu. More will be coming up again at the end of August and September.

In all of these cases, before we can pay storage, we must have a statement in writing for the facilities that you do not own showing that you have use of these facilities for storage the next year. Because of the various anniversary dates, we would recommend a statement showing use through December 31, 1988.

Facilities with corn in now include the following:

East & Middle Bin of three
on Harold Gratz Farm

Only Bin on farm where you live

Machine Shed, Cattle shed West of house, Large bin,
and small bin on Koschee Farm

Flat storage shed and bin on Moore Farm

Bin on Estate Farm of Harold Gratz

Call us if you have any questions.

Sincerely,

/s/ Leon N. Wolfe
Leon N. Wolfe
County Executive Director

[August 3, 1987]

Rotation request

Amount – 20,000 bu.

Location – Koesche – large shed.

Time – Start Aug. 3 – 1987

Oct 3 –

Liens – Waivers-/Citizens Bank

Requested

Therese Gratz 7-31-87

approved – Sherman Eustice 8-3-87

COC Action

Buyer: Fink's Grain

UNITED STATES
DEPARTMENT OF AGRICULTURE
Agricultural Stabilization and
Conservation Service
Lafayette County ASCS Office
P.O. Box 190
Darlington, Wisconsin 53530

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

September 23, 1987

James Gratz
10731 Golf Course Road
Darlington, Wis. 53530

Dear Mr. Gratz:

The County ASC Committee has determined that you have disposed of the mortgaged collateral securing your 1985 crop corn loan number 154F without authorization. The disposition is a violation of your Farm Storage Note and Security Ageement.

As a result of this violation, the maturity date on your loan has been accelerated and liquidated damages as well as any other applicable penalties will be assessed on the quantity disposed of without authorization.

You have 10 days beginning on the date of this letter to repay the loan, liquidated damages, and other applicable penalties. (Or by October 3, 1987.)

Contact this office regarding any questions that you may have concerning this matter.

Sincerely,

/s/ Leon N. Wolfe
Leon N. Wolfe
County Executive Director

ch

P.S. Certificates may only be used to redeem corn still remaining. Certificates may not be used to redeem corn already gone when spotcheck was performed.

Lafayette County ASCS Office
P.O. Box 190
Darlington, Wisconsin 53530

September 23, 1987

James and Therese Gratz
10731 Golf Course Road
Darlington, Wisconsin 53530

Dear Mr. & Mrs. Gratz:

The Lafayette County ASCS Committee has again reviewed all your corn loans and the problems involved relative to securing storage space.

In addition to calling 1985 corn loan #154 for 37,128 bu. because of unauthorized disposition, the committee is calling all your 1982, 1984, and remaining 1985 corn loans because of loss of storage space and continuing corn quality problems.

Also the 1986 loans that matured July 31, 1987 and August 31, 1987 are now having delivery notices issued as is all stored on the Moore and former Koesche farm. Delivery notices are enclosed.

All future payments from our office will be applied towards shortages and settlement of called loans. On the called 1982, 1984, and 1985 loans delivery notices will be

issued immediately after 10 days from the date of this letter or Oct. 3, 1987. If you intend on delivering all these additional loans contact us at once to arrange for issuing deliver notices before Oct. 3rd.

Sincerely,

/s/ Leon N. Wolfe
Leon N. Wolfe
County Executive Director

LW/ch

Enclosure

* * *

78 STORABILITY OF LOAN COLLATERAL THREATENED

The producer is responsible for any loss in quantity and quality of the commodity placed under farm-stored loan. CCC will not assume any loss except according to paragraph 162.

A If Storability of Collateral is threatened and it is:

1 Reported by the producer, inspect the commodity immediately. Samples may be drawn to confirm report.

2 Discovered by the commodity inspector, immediately notifying the producer of the S – findings, "in writing." – S

B In addition to the action taken in subparagraph A, the County Office shall notify the producer that:

1 Corrective action must be taken.

2 The commodity will be reinspected within 30 days.

3 If the producer does not correct the problem within 30 days, the loan will be called.

* * * *

326 ROTATION UNDER RESERVE ROTATION FUND

* – A 60 days before the producer intends to have – * replacement stocks in place, and upon written request, reserve stocks may still be released to the producer for delivery to a buyer for sale or for livestock feed if:

1 COC determines that CCC's best interest is not protected without security.

2 A lien waiver is not obtained on an encumbered unharvested crop.

B Follow these procedures if subparagraph A applies:

1 Inspect and measure the reserve commodity, and inspect the unharvested crop according to subparagraphs 325 D 3 and 325 D 5 a.

2 A time schedule for releasing reserve quantities as livestock feed shall be established for the producer to pay loan value and early redemption charges to the County Office before moving grain.

UNITED STATES DEPARTMENT OF AGRICULTURE
Agricultural Stabilization and Conservation Service
Lafayette County ASCS Office
P.O. Box 190
Darlington, Wi 53530

January 8, 1988

James Gratz
10731 Golf Course Rd
Darlington, Wi 53530

Dear Mr. Gratz:

On January 6, 1988, the Lafayette County ASCS committee again reviewed the status of your called 1982, 1984 & 1985 corn loans. You did meet with the County Committee on December 14, 1987 and asked ASCS to handle these called loans in a "timely fashion" basis. The committee delayed taking any further actions at that meeting and again at the December 18, 1987 COC meeting.

The committee decided to reissue the delivery notices on the two remaining 1982 Special Producer loans that matured November 30, 1987, and the 1985 Grain Reserve Agreement covering 6388 bushels. Total bushels involved in these three loans amounts to 29,152 bu., which should be covered by the corn in the flat storage at the Moore farm and the flat storage at the Koesche farm.

The reasons for calling these three loans stored in these two facilities are:

1. Quality of Corn – heating and crusting was found on 12/17/87.

2. Whenever unauthorized disposition of corn is found, the committee can consider calling

any or all other outstanding loans if they feel it is necessary to protect CCC's interest.

3. Failure to provide storage agreements – Always required when the storage facility is not owned by the borrower.

4. 1982 loans matured on November 30, 1987.

You have 15 days to appeal the call of these loans or until January 23, 1988. Appeals must be in writing and state specific reasons for appeal.

You also have the right to redeem the bushels secured by these loans with commodity certificates up to the date the delivery notice expires. The County office will need to have record of sales of corn redeemed with certificates to prevent later delivery of the same corn against unredeemed loans.

This action leaves the remaining loans in call status, but delivery is not being pursued, pending storage arrangement at the former Koesche farm, necessary appeal of the 1985 commodity loan where it was determined unauthorized disposition occurred and other factors.

The committee confirmed previous indecision as to unauthorized disposition of corn stored in the large cattle shed at the former Hoesche farm. The total shortage amounted to 9396 bu. and has been partially repaid by setoff from the final 1986 program cash payment. Remaining bushels to be repaid on this shortage are 5513 at $3.07 per bushel for a total of $16,938.19.

The Remaining Loans still in call status are

1985	Grain Reserve Agreement	#519	5330 bushels
1985	Grain Reserve Agreement	#518	6347 bushels
1985	Grain Reserve Agreement	#522	1741 bushels
1984	Grain Reserve Agreement	# 84	14,192 bushels
1984	Grain Reserve Agreement	# 85	21,933 bushels

This represents the corn stored in bins owned by Harold Gratz and the two bins at the former Koesche farm.

Determination of Unauthorized Removal resulted in all loans being called, denial of farm stored loans for 2 years and liquidation charges. The County Committee with District Director concurrence can rescind called loans on bushels still on hand and the 2 year loan denied *upon written appeal by you.* This written appeal must be submitted to the County Office no later than January 23, 1988.

Bad Faith

First Time I Was Informed Of Appeal 5 mo. After Improper Action Started]

[James Gratz' Handwriting]

Sincerely,

/s/ Leon N. Wolfe
Leon N. Wolfe
County Executive Director

lnw/slb

1/13/88

Dear Sirs:

I would like to appeal your decision to call my corn loans. At this time very little has changed from the last several times which you turned down this same appeal, except the Citizens Bank now insists that I make this appeal.

Thank You

James Gratz

[Handwritten Letter]

EXECUTIVE SESSION

Lafayette County Minutes

Date: January 26, 1988
Time: 10:00 A.M.
Place: Lafayette Co. ASCS Office

Persons Present: Sherman Eustice, Chairperson
Royal Wills, Vice Chairperson
William Calvert, Member
Leon N. Wolfe, County Executive Director

1. COMMODITY LOANS

A. Appeal of called loans

James Gratz appeals call of all commodity loans. Indicates very little has changed from previous circumstances but lender insists producer proceed with appeal.

PS PA obtained update from McKenna Grain in regards to Gratz's recent corn deliveries. Shed on Moore farm and shed and small bin on Koschee farm have been totally emptied. Looking at bushels delivered from these structures versus bushels we last measured in these same structures on 12/17/87 CCC is short by 357 bu. These are figures prior to any adjustments or discount due to quality problems.

In Moore shed about 50% of the corn hauled in was pretty good. Other 50% had some total damage as high as 18%, was musty and sour. McKenna has isolated poor quality corn in separate bin.

Corn from Koschee shed was not good all the way through. It was discovered that water was coming in

underneath on West end of building. 3-4 inches of commodity along that area were considered totally lost and not salvageable. Warehousemen indicates this could be as much as 1000 bu. Remaining corn had low test weight, some FM% as high as 8% due to fines, TD% ranging from 7.8% to 15%.

CCC will be incurring cost of trucking, time of one man possibly two, rent of auger and bobcat, hook up and disconnect of electricity, cost to township for plowing snow. All of these will be charged to producer when settlement is completed.

Corn remaining is stored in large bin on Koschee Farm, bin on farm where Jim Gratz lives (farm owned by Harold Gratz), 3 bins on farm were Ed Gratz lives (farm also owned by Harold Gratz) and bin on Estate farm of Harold Gratz. Harold Gratz has provided a rental statement to James Gratz on the bins on his farms.

COC reviewed all of above facts along with James Gratz appeal which did not provide any facts or pertinent information for reconsideration of their previous action. William Calvert abstained from voting on any action in regards to this case. COC will reinstate loans for bushels in 3 bins on farm of Harold Gratz where Ed lives and on Estate farm of Harold Gratz. COC wants corn in large bin on Koschee farm delivered due to questionable quality and lack of control of storage structure. COC also wants bin on farm where Jim lives emptied out and delivered in. This corn has been there since 1984 and quality again is questionable.

At their next meeting COC wants update on the quality of corn that is delivered in from these 2 structures.

Inspection of corn remaining in storage is to be done in mid March.

* * *

COMMODITY LOANS APPEAL HEARING

PLACE: Lafayette County Ag Center
Conference Room
Darlington, Wisconsin

DATE: March 8, 1988
TIME: 1:30 p.m.

* * *

[p. 33] Q Now when these quality determinations, the quality of the corn in these discounts are made, that's made by the warehouseman?

A Correct.

Q Is that what's authorized in your procedure that the warehouseman does that?

A Correct.

Q There is no Independent Verification of that quality by your office, is that correct?

A No, our office – our office has no training on grading of corn and quality. There is an appeal route on grading. A producer can have samples sent to a Federal grading, Federal lab for grading. Usually that would be in Milwaukee.

* * *

REVISED

UNITED STATES
DEPARTMENT OF
AGRICULTURE

Agricultural
Stabilization and
Conservation Service

Wisconsin State ASCS Office
4601 Hammersley Road
Madison, Wisconsin 53711

April 12, 1988

Mr. James Gratz
10731 Golf Course Road
Darlington, WI 53530

Dear Mr. Gratz:

The Wisconsin State ASC Committee have reviewed your appeal relative to the calling and delivery of farmstored corn loan collateral to the Commodity Credit Corporation (CCC). They thank you for presenting your views and information at the hearing held April 4, 1988 at the Wisconsin State ASCS Office located in Madison.

Your appeal letter contained 10 items for consideration. Reference is made to the March 10, 1988 appeal letter to the Lafayette County ASCS Office containing 9 items and the additional item involving denial of storage payments on corn CCC has taken possession of.

The State Committee have determined the following based on your presentation and information and information from the county ASCS Office and County ASC Committee.

1 Unauthorized Disposition of 9917 bushels of corn. The State Committee have determined that this did not

occur and the shortage was due to an erroneous measurement and shrinkage.

* * *

7 The State Committee have concurred with the County Committee's decision to call all loans. The loans remaining undelivered are to be delivered. Corn stored on the Morrissey Farm (Koesche) is of poor quality and should be delivered immediately or redeemed with cash or commodity certificates. Further, there is no lease with the owner of the storage structure. For the corn stored on Harold Gratz's, the State Committee will consider rescinding the call provided you can present to the County Committee a rental lease for the bushels of corn under loan from Harold Gratz. The lease term shall not be less than the loan maturity date. This lease, if obtained, is to be in the County Office within 2 weeks. However, if the quality of the corn is deteriorating the county shall call the loan. The county is to monitor the quality.

* * *

The State Committee have carefully reviewed your case and taken into consideration all available records and materials, including the information you presented.

If you feel that the facts have not been properly considered in this matter, you may appeal within 15 days of the date of this letter to the:

Deputy Administrator, State and County Operations, ASCS
United States Department of Agriculture
Administration Building, Room 243-W
Washington, D.C. 20013

If you appeal this decision to the Deputy Administrator, you should furnish factual information and reasons why you believe the State Committee's determination is wrong.

Sincerely yours,

/s/ Milford L. Thompson
Acting State Executive Director
Wisconsin State ASCS Office

CC: Lafayette County ASCS Office

UNITED STATES
DEPARTMENT OF
AGRICULTURE

Agricultural
Stabilization and
Conservation Service

Wisconsin State ASCS Office
4601 Hammersley Road
Madison, Wisconsin 53711

May 13, 1988

Mr. & Mrs. James Gratz
10731 Golf Course Road
Darlington, WI 53530

Dear Mr. & Mrs. James Gratz:

The Wisconsin State ASC Committee have reviewed your request to keep the farm stored corn under loan with the Commodity Credit Corporation (CCC). As previously discussed with you, a written base was a prerequisite before the Committee could consider your request. Senator Robert Kasten's representative, Art Kurtz, had discussed your request with me and the State Committee.

The Lafayette County ASCS Office has informed the Committee that a written lease with the land and grain storage facility owner is on file in their office. According to the County Office, the lease expires September 1, 1988.

The State Committee have determined to rescind calling of the commodity loan stored on the Morrisory farm at this time. The County Office has been informed accordingly. They are also to monitor the grain quality. You are responsible for maintaining the quality and quantity of the corn. The County Office will periodically check the corn for both quality and quantity.

The State Committee and I want to thank you for meeting with them to discuss the situation that has led to the

indebtedness. We will review your loan records to determine if the payments and application of commodity certificates (CCC-6's) were applied to loan liquidation with the best interests of you and CCC.

We will keep you abreast of our review. When this is accomplished, you will have a more complete picture of the case and understand any balance of monies due CCC.

If you have any further questions, feel free to contact the Lafayette County ASCS Office or this office.

Sincerely,

/s/ ARB
Roland Bergman
Acting SED
Wisconsin State ASCS Office

CC: Lafayette County ASCS Office
Senator Kasten's Office – Madison

(Seal)

United States
Department of
Agriculture

Agricultural
Stabilization and
Conservation Service

P.O. Box 2415
Washington, D.C.
20013

NOV 23, 1988

Mr. James Gratz
Route 1
Darlington, WI 53530

Dear Mr. Gratz:

This responds to your appeal determinations by the Wisconsin State ASC Committee concerning the calling and settlement of various farm-stored commodities loans.

The record shows that the State committee assessed and responded to 10 concerns you raised regarding loan actions by the Lafayette County ASC Committee. These determinations were that:

1. Unauthorized disposition of 9,917 bushels of corn did not occur.

2. While payments to settle all loans would be required, liquidated damages would not be assessed.

3. Respective deficiencies of 1,000 and 4,510 bushels could be settled by a redemption provided ownership was verified by written statement signed by Harold Gratz and finalized prior to April 29, 1988.

4. Rental rates billed by the warehouse were reasonable and would not be further addressed by appeal.

5. The grade of forfeited grain was assessed by a qualified Federal warehouse.

6. You were responsible for the cost of moving collateral grain to the designated warehouse.

7 The county committee acted appropriately and within its authority when it called the subject loans; however, your loans may be reinstated provided: storage facilities are leased through maturity dates, such leases are obtained prior to April 29, 1988, and the quality of the collateral grain is not deteriorating.

8. For commingled grain under separate loans, the assessed shortage shall be applied to the loan with the lowest loan rate.

9. The county committee did credit the shortage in the most advantageous method to you.

10. Storage had been credited to you whenever such had been earned.

We understand that you cannot accept these determinations. You stated that the Lafayette County Committee was overly restrictive and biased in its assessments. You disputed the county office's ability to correctly assess the quality of collateral grain. You noted that all grain has weevils. In this respect, the county office allegedly erred by calling your various loans. You have previously received a number 1 grade on corn which the county committee had determined to be deteriorating. You stated

that this was achieved by your spraying and screening grain prior to delivery.

You further noted that while you may not have had a lease on all storage facilities throughout the 9-month loan period you did have other storage available to you had it been necessary. Furthermore, such leases were eventually acquired. You thus believe that your loans were improperly called for the lack of facility leases.

You also disputed the loan rate which was applied to a collateral shortage under commingled corn loans numbered 9, 340, and 79. You requested the use of a $1.74 rate.

You also could not accept the loan settlements resulting from the movement of corn from storage without your consent. You claim that your interests were not protected. You alleged that you were not timely informed of the quality and quantity of the delivered corn. You further allege that with spraying and screening prior to delivery you would not have been assessed such a large deficiency upon loan settlement.

You finally requested that the Commodity Credit Corporation (CCC) assume the loss for approximately 1,000 bushels of collateral corn. You alleged that this loss was caused by a natural disaster. You claim that storm water damaged grain at the bottom of a storage facility.

Based on our review of the record, including information you provided during and also following a hearing, we have concluded that the county committee acted properly within its delegated authority. However, we have determined to grant some relief. To the extent that any concerned loan was not called due to deteriorating condition

(in the judgment of the county committee) the called loans shall remain in effect through maturity. Your appeal is otherwise denied.

You should understand that we have reviewed each of your various concerns. However, we were unable to identify sufficient justification to warrant any additional relief.

County committees have authority to call any loan when it concludes that the interest of the CCC may be in jeopardy. Such actions may be justified by either a belief that the condition of collateral grain is deteriorating or a change in the status of a storage facility.

The three loans you referenced in your request for the use of a $1.74 loan rate were 1986 commodity loans. The $1.74 loan rate was inappropriate for these loans.

You were provided an opportunity to deliver collateral grain. You chose not to comply with these delivery notices. The county committee then arranged for delivery. While you were not timely notified of the amount and condition of such forfeited corn, you did not attempt to identify such information nor did you otherwise take any action to protect your own interest in the matter. In this respect your subsequent allegations of improper actions cannot be confirmed. We are unable to identify a basis for relief.

In support of your claim of a natural disaster, you provided various documents identifying insured losses by other persons. This information does not identify that you experienced a loss due to a natural disaster.

This letter is a final determination under the appeal regulations contained at 7 CFR Part 780 and is not subject to further administrative review or reconsideration.

Sincerely,

/s/ Thomas A. VonCarlern
Acting Deputy Administrator,
State and County Operations

[SEAL] **United States Department of Agriculture**

Federal Grain Inspection Service

Revised January 1978

Official United States Standards for Grain

UNITED STATES STANDARDS FOR CORN

§ 26.352 Principles governing the application of the standards

The following principles shall apply in the determination of the classes and grades of corn:

(a) Basis of determination. Each determination of the class, damaged kernels, heat-damaged kernels, flint corn, and flint and dent corn shall be upon the basis of the grain after the removal of the broken corn and foreign material. All other determinations shall be upon the basis of the grain as a whole.

(b) Percentages. All percentages shall be determined upon the basis of weight.

(c) Moisture. Moisture shall be ascertained by the air-oven method for corn prescribed by the United States Department of Agriculture as described in Service and Regulatory Announcements No. 147 (1959 Revision) of the Agricultural Marketing Service, or ascertained by any method which gives equivalent results.

(d) Test weight per bushel. Test weight per bushel shall be the weight per Winchester bushel as determined

by the method prescribed by the United States Department of Agriculture as described in Circular No. 921, issued June 1953, or as determined by any method which gives equivalent results.

§ 26.353 Grades, grade requirements, and grade designations

The following grades, grade requirements, and grade designations are applicable under these standards:

Corn

(a) Grades and grade requirements for Corn. (See also paragraph (d) of this section.)

Grade	Minimum test weight per bushel	Maximum limits of–			
		Moisture	Broken corn and foreign material	Damaged kernels	
				Total	Heat-damaged kernels
	Pounds	Percent	Percent	Percent	Percent
U.S. No. 1.....	56.0	14.0	2.0	3.0	0.1
U.S. No. 2.....	54.0	15.5	3.0	5.0	.2
U.S. No. 3.....	52.0	17.5	4.0	7.0	.5
U.S. No. 4.....	49.0	20.0	5.0	10.0	1.0
U.S. No. 5.....	46.0	23.0	7.0	15.0	3.0

U.S. Sample grade	U.S. Sample grade shall be corn which does not meet the requirements for any of the grades from U.S. No. 1 to U.S. No. 5, inclusive; or which contains stones; or which is musty, or sour, or heating; or which has any commercially objectionable foreign odor; or which is otherwise of distinctly low quality.

Special grades for corn

(d) Special grades, special grade requirements, and special grade designations for corn.

(3) **Weevily corn – (i) Requirements.** Weevily corn shall be corn which is infested with live weevils or other insects injurious to stored grain.

(ii) **Grade designation.** Weevily corn shall be graded and designated according to the grade requirements of the standards applicable to such corn if it were not weevily, and there shall be added to and made a part of the grade designation the word "Weevily."

Supreme Court, U.S.
FILED
MAY 17 1993
OFFICE OF THE CLERK

No. 92-1492

In the Supreme Court of the United States

OCTOBER TERM, 1992

JAMES L. GRATZ AND THERESE GRATZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

DAVID M. COHEN
ANTHONY J. STEINMEYER
THOMAS P. MCLISH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

18 pp

QUESTION PRESENTED

Whether the Department of Agriculture's decisions (1) to insist on third parties' waivers of liens on grain that petitioners proposed to place in a grain reserve program, and (2) to accelerate the maturity of petitioners' commodity loans, comported with the Due Process Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1492

JAMES L. GRATZ AND THERESE GRATZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1) is not published, but the judgment is noted at 985 F.2d 583 (Table). The opinion of the United States Claims Court (Pet. App. A2-A22) is reported at 25 Cl. Ct. 411.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 1992. Pet. App. A1. The petition for a writ of certiorari was filed on March 15, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Agriculture operates various programs that allow farmers of grain and similar products to obtain price support loans from the government. The programs involved in this case were the Price Support, Grain Reserve, and Special Producer loan programs, which were administered by the Commodity Credit Corporation (CCC) through the Agricultural Stabilization and Conservation Service (ASCS) of the Department of Agriculture. Under those loan programs, a producer could obtain a nonrecourse loan from CCC by giving CCC a lien on the commodity, which the producer then stored as collateral on the farm or in warehouses. See generally 7 C.F.R. Pt. 1421 (1987).[1] The grain reserve program also provided that eligible producers would receive storage payments if prices were below certain levels. See 7 C.F.R. 1421.749, 1421.750 (1987). The parties' rights and duties were memorialized in storage and security agreements. See 7 C.F.R. 713.49-713.50, 1421.740, 1421.900 (1987).

At the time of the events in this case, the governing regulations provided that "CCC may, at any time, accelerate the time for repayment of a price support loan indebtedness," upon giving ten days' notice of the acceleration. 7 C.F.R. 1421.6(d) (1987). The regula-

[1] The current regulations in Part 1421 apply to grain crops for the 1991 and subsequent crop years. See 7 C.F.R. 1421.1 (1993). Because the key events in this case took place in 1987 and early 1988, we cite the 1987 regulations, which covered crops from 1986 and afterward (see 7 C.F.R. 1421.1 (1987)). This case also involves loans from earlier crop years, but the regulations covering those crop years were essentially similar to the 1987 regulations.

tions did not limit the bases for calling a loan, but typical reasons for doing so included (1) deterioration of the quality of the collateral (see 7 C.F.R. 1421.15 (1987)); (2) improper certification of the quantity of the collateral (see 7 C.F.R. 1421.17(f) (1987)); and (3) unauthorized disposition of the collateral (see 7 C.F.R. 1421.17(g) (1987)). Furthermore, if a producer did not repay a loan when it was due, CCC had the right to sell or acquire title to the collateral (7 C.F.R. 1421.20 (1987)), and the producer was liable for any loss due to quantity or quality problems that CCC might experience when it sold the grain (7 C.F.R. 1421.15 (1987)).

2. a. As of May 1987, petitioners held over 150,000 bushels of grain in storage as collateral for their 13 farm storage loans from CCC. Pet. App. A38. In that month, however, petitioners' county ASCS committee informed them that inspections of grain stored at several locations had revealed quality problems, including the presence of mold, crust, and weevils. *Id.* at A36-A37. After meeting with the county committee, petitioners requested permission to rotate 20,000 bushels of corn—that is, to sell old corn in the program and to replace it with new corn. The county committee provisionally granted that request (*id.* at A7-A8, A39, A43), but a lien search disclosed two outstanding liens on the new grain that petitioners proposed to use as replacement grain (*id.* at A8). Petitioners were unable to secure a waiver from one of the two lienholders, as required by 7 C.F.R. 1421.10 (1987). Therefore, when petitioners sold the old corn, the county committee did not allow petitioners to use the proposed replacement grain in the loan program. Petitioners were unable to purchase unencumbered

replacement grain with their own money, and as a result they were no longer entitled to storage payments for 20,000 bushels of corn. Pet. 11.

Next, as several of petitioners' loans approached their July 1987 maturity dates, the county ASCS committee gave petitioners the option of extending those loans for one year. Consistent with 7 C.F.R. 1421.7 (1987), however, the county committee required that petitioners submit written proof of adequate arrangements to store their grain for the next year. Pet. App. A41-A42. Petitioners failed to furnish the county committee with the requested proof of rental agreements for storage areas that they did not own. *Id.* at A9. Meanwhile, inspections of petitioners' stored grain continued to reveal weevils, mold, and crust at several locations. *Id.* at A8, A9-A10, A11-A12, A36-A37, A49, A54-A55. Furthermore, the county committee was informed that petitioners had, without authorization, disposed of corn that secured one of their loans. *Id.* at A44. In response to these various problems, the county committee called all of petitioners' loans in September 1987 and informed petitioners that notices to deliver the collateral would be forthcoming. *Id.* at A44-A46.

The county ASCS committee promptly took possession of some of the collateral (approximately 40,000 bushels, according to petitioners (Pet. App. A30)), but not all of it. Before demanding delivery of the remaining grain, the county committee met and corresponded with petitioners numerous times over the next few months and afforded them several opportunities to improve the quality of the stored corn and to provide proof of storage arrangements. *Id.* at A10-A13. In January 1988, after petitioners failed to take

advantage of those opportunities, the county committee notified petitioners that it would reissue delivery notices for approximately 30,000 bushels, citing problems with corn quality, unauthorized disposition of corn, failure to provide storage agreements, and the fact that several more of petitioners' loans had matured in the normal course. The January letter formally notified petitioners of their right to appeal within 15 days. *Id.* at A12, A49-A51.

b. Petitioners did appeal. The county ASCS committee noted continued quality problems and generally rejected petitioners' arguments, but it did agree to reinstate certain loans. Pet. App. A12, A54-A56. However, soon thereafter, in February 1988, the committee decided to recall all of petitioners' loans, based on further reports of unauthorized disposition of collateral and of corn quality problems. The committee gave petitioners 10 days within which to repay their loans before delivery notices would be issued, and informed them that they had 15 days to appeal. *Id.* at A12-A13. Petitioners' second appeal to the county ASCS committee proved unsuccessful, and they then exercised their right (of which they had been informed) to appeal to the Wisconsin state ASCS committee. *Id.* at A13.

c. The state ASCS committee heard petitioners' appeal in April 1988. The state committee affirmed the county committee's decision to call all the loans, based on quality problems and petitioners' failure to provide storage lease agreements. The state committee reversed the determination of unauthorized disposition of collateral, however, finding that the shortage of corn was due to erroneous measurement and to shrinkage. Pet. App. A13, A58-A59. The state

committee also authorized the reinstatement of certain loans if petitioners would submit a written storage lease. *Id.* at A13, A59. When petitioners finally submitted a lease in May 1988, the state committee rescinded the calling of the affected loans. *Id.* at A14, A61-A62.

d. Petitioners then appealed to the ASCS's Deputy Administrator for State and County Operations (DASCO), as they had been informed they had the right to do. See Pet. App. A60. In November 1988, the Acting DASCO "concluded that the county committee acted properly [and] within its delegated authority." *Id.* at A65. Although affirming the earlier decisions in virtually all respects, the Acting DASCO did offer to restore any of petitioners' loans that had not been called due to deteriorating quality. *Id.* at A65-A66. Although petitioners were later reminded of their opportunity to reinstate those loans, they did not attempt to do so. *Id.* at A14.

3. Petitioners instead filed this suit in the United States Claims Court. In March 1992, the court granted the United States' motion for summary judgment, concluding that the ASCS had acted rationally, within its authority, and according to proper procedures. Pet. App. A2-A22.

The Claims Court first rejected petitioners' substantive due process claims. It noted that the county ASCS committee was authorized under 7 C.F.R. 1421.6(d) (1987) to accelerate loan repayments at any time, and concluded that the decision to do so was not arbitrary and capricious in light of the persistent quality problems with petitioners' grain. Pet. App. A16-A18. The court further held that it was rational and appropriate for the ASCS to require storage

agreements as a condition of extending petitioners' loans, and that 7 C.F.R. 1421.10 (1987) and the parties' past course of dealing had put petitioners on notice that lien waivers would be required for all stored collateral. Pet. App. A18-A19.

The Claims Court next rejected petitioners' procedural due process allegations, assuming arguendo that it could entertain such claims. Relying on *Frank's Livestock & Poultry Farm, Inc.* v. *United States*, 905 F.2d 1515 (Fed. Cir. 1990), the court held that the numerous hearings and correspondence provided at the county, state, and federal levels satisfied any applicable due process requirements. Pet. App. A20. Finally, the court rejected petitioners' contentions that their property was taken without just compensation and that the regulation describing the relationship between county ASCS committees and their inspectors was too vague. *Id.* at A21-A22.

4. Petitioners appealed to the Federal Circuit, but the court of appeals affirmed without opinion. Pet. App. A1.

ARGUMENT

Petitioners repeat their challenges to the substance and the procedure of the determinations of the Department of Agriculture. The courts below correctly rejected petitioners' claims, however, and their rulings do not conflict with any decision of this Court or of any court of appeals. Further review of the unpublished order of affirmance is therefore unwarranted.[2]

---

[2] As a threshold matter, the Claims Court (now the Court of Federal Claims) lacked jurisdiction to entertain petitioners' due process claims. The Due Process Clause cannot fairly be

1. The courts below properly sustained the ASCS's substantive decisions. The scope of the lower courts' review was extremely narrow. Under 7 U.S.C. 1385 and 1429, the agency's factual determinations are "final and conclusive," so long as they are consistent with the Commodity Credit Corporation Charter Act, 15 U.S.C. 713a-4 *et seq.*, and with applicable regulations. As a result, the Claims Court properly recognized that it could review only the legal question whether the agency acted rationally and according to its authority. Pet. App. A15.

a. Petitioners claim (Pet. 11) that the county ASCS committee violated substantive due process by insisting on lien waivers at a time when, due to grain quality problems, petitioners attempted to rotate 20,000 bushels of grain in the reserve program. It is beyond dispute, however, that 7 C.F.R. 1421.10 (1987) expressly required lien waivers for all collateral, in order to protect the government's interest should a producer default. Petitioners' storage and security

interpreted as mandating payment of compensation by the United States for a violation (*United States* v. *Hopkins*, 427 U.S. 123, 130 (1976) (per curiam)), which is a prerequisite for a cause of action to be brought under the Tucker Act, 28 U.S.C. 1491 (see *United States* v. *Mitchell*, 463 U.S. 206, 215-216 (1983); *United States* v. *Testan*, 424 U.S. 392, 399-400 (1976)). To the extent that petitioners claim that the ASCS acted arbitrarily, capriciously, or contrary to regulations, their proper remedy was a suit in federal district court under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Although contract claims properly lie in the Court of Federal Claims under the Tucker Act, petitioners do not claim that the government breached the terms of the storage and security agreements. For these reasons alone, petitioners' Tucker Act claims are without merit and do not warrant review.

agreement similarly required them to warrant that the collateral was free of all liens except those in favor of lienholders who had waived their priority as against the government. See Pet. App. A19.

Although petitioners may have had lien waivers for the grain they originally stored, the county committee properly sought assurances that the new grain petitioners sought to rotate in to replace the old grain was free of encumbrances. A lien search disclosed that the proposed replacement grain was encumbered, and petitioners were unable to obtain a waiver of one of those liens. Because petitioners could not obtain unencumbered replacement grain, the county committee properly refused to allow their new grain into the reserve program. The decision to do so plainly was not arbitrary, and it did not deny petitioners substantive due process.

b. Petitioners also contend (Pet. 19-20) that the agency acted arbitrarily and violated their substantive due process rights by calling their loans. Under 7 C.F.R. 1421.6(d) (1987), however, the agency had the right to accelerate the maturity of petitioners' loans at any time for any reason. Petitioners' loans were called due to, among other things, quality problems with stored grain and petitioners' failure to provide proof of storage leases. The administrative record fully supports the rationality of that decision.[3]

[3] The county ASCS committee also relied on its belief that petitioners had disposed of some collateral (approximately 10,000 bushels of corn) without authorization. Pet. App. A45, A49-A51. Ultimately, the state ASCS committee determined that the shortage was due to measurement error and shrinkage, but it nevertheless affirmed the county committee's decision to call all the loans. Thus, the decision to call the loans

The Claims Court correctly refused to disturb the agency's factual findings that petitioners' corn continually suffered from quality problems. Petitioners point out (Pet. 10-11, 13-14, 19-20) that inspectors rated much of their grain as "satisfactory," and only a portion as "questionable." But it is indisputable that the inspectors repeatedly described the corn as moldy, crust-covered, and weevil-infested. See, *e.g.*, Pet. App. A5-A6, A8, A36-A37, A49, A54-A55. Accordingly, as the Claims Court concluded, the county ASCS committee did not arbitrarily ignore the inspection reports and rely on its own expertise when deciding to call petitioners' loans; rather, the committee looked beyond the conclusory quality ratings to the totality of the reports. *Id.* at A16-A18.[4]

Furthermore, the Claims Court correctly concluded (Pet. App. A18-A19) that the agency acted rationally and within its authority when it required petitioners to submit written lease agreements for storage at facilities that they did not own. As the court explained, "[f]armers in the grain reserve program store government property; a requirement

did not turn on the allegation of unauthorized disposition. *Id.* at A58-A59.

[4] Petitioners obliquely suggest (Pet. 20) that the agency violated its own inspection regulations. Presumably petitioners refer to the Claims Court's observation (Pet. App. A16) that the inspectors' forms did not precisely track the criteria of the Federal Grain Inspection Service, and that the court could not be certain whether the inspectors used those criteria. The Claims Court found, however, that the inspectors' reports "were sufficiently comprehensive to provide the DASCO with a rational basis for affirming the county committee's decision to call [petitioners'] loans due to quality concerns." *Id.* at A17.

that farmers assure storage availability to the Government's satisfaction is both rational and appropriate." *Ibid.* For eleven months petitioners had failed to demonstrate that they had such leases. Ultimately, petitioners produced one lease covering a portion of their grain, and the affected loans were reinstated. *Id.* at A14.

2. Petitioners have two distinct procedural due process claims, one regarding storage payments for the 20,000 bushels of grain and one regarding the calling of their loans. The courts below correctly rejected both.

a. Petitioners contend (Pet. 15) that they were deprived of a right to continued reserve storage payments. They were not deprived, however, of any property interest cognizable under the Due Process Clause. When petitioners redeemed the 20,000 old bushels of stored corn, any property right to storage payments they might once have had for that corn was eliminated. Petitioners' true complaint is that they were prevented from receiving storage payments for the 20,000 bushels of *replacement* corn. As to that corn, petitioners were merely applicants for new benefits, not holders of an established right to benefits. As a result, the denial of the requested benefits deprived petitioners of no property interest that could in turn trigger procedural rights under the Due Process Clause. See *Lyng* v. *Payne*, 476 U.S. 926, 942 (1986).

Even if applicants for benefits could be said to have a "property" interest in potential benefits, no hearing was required in this case. Petitioners were refused participation because they failed to obtain all the lien waivers required by 7 C.F.R. 1421.10 (1987).

Petitioners never claimed that they in fact obtained lien waivers; they claimed only that lien waivers were not required. No hearing could alter the mandatory character of 7 C.F.R. 1421.10 (1987), and petitioners were not entitled to a hearing to ask the county committee to "be lenient and depart from legal requirements." *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 543 n.8 (1985).

b. Petitioners also contend (Pet. 15) that they were denied due process when their loans were called and, lacking cash to repay the principal, they had to deliver the corresponding collateral corn. At the outset, petitioners' property interest must be put in perspective. The grain had been pledged as collateral, and petitioners' interest in the collateral was delimited by their loan contracts and the governing regulations, under which the government had the right to call the loans at any time. If petitioners were unable to pay back the principal, the government was entitled to take possession of the collateral and devote the proceeds to pay down the amount petitioners owed. That is precisely what happened. Thus, the government simply exercised *its* property rights in the grain; it did not deprive petitioners of any distinct, unencumbered rights.

In any event, even if we assume that petitioners were "deprived" of "property" within the meaning of the Due Process Clause when their loans were called, they received all the process that was due. As explained above, before ASCS officials demanded delivery of collateral in September 1987, and again before loans were called a second time in January 1988, petitioners were notified of the problems with grain quality and of the need for them to submit

storage leases in order to obtain an extension of matured loans. The notification and opportunity to respond were sufficient at the pre-deprivation stage. See *Loudermill*, 470 U.S. at 545-546. After the deprivation, petitioners were notified of and availed themselves of the elaborate appeal rights provided for in 7 C.F.R. Pt. 780 (1987), including hearings at the county, state, and national levels. Moreover, petitioners were entitled to file a contract action in the Claims Court for damages if the government had breached its obligations under the loan agreement. The combination of these procedures readily satisfied any applicable due process requirements. See also *Frank's Livestock & Poultry Farm, Inc.* v. *United States*, 905 F.2d at 1518.

Application of the flexible three-part test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), confirms that the Constitution required no additional procedural protections. Under that test, the relevant factors to determine the process due include the private interest at stake, the governmental interest in prompt action and in avoiding unduly cumbersome administrative burdens, and the risk of an erroneous determination. *Id.* at 335. Here, the risk of an erroneous call of the loans was nil, because the ASCS had the absolute right to call the loans at any time. Furthermore, loans are frequently called (and were here) because of fears that the producer is damaging the collateral; it would be impractical for the ASCS to wait until the end of a protracted appeals process to protect its security interest. Compare *Connecticut* v. *Doehr*, 111 S. Ct. 2105, 2115 (1991). Moreover, because loan reinstatement is available following a successful appeal, the producer's countervailing interest is only

in avoiding the temporary deprivation of the loan. While not trivial, that interest is hardly as critical as an interest in continued employment (as in *Loudermill*), welfare benefits (as in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970)), or utility service (as in *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1 (1978)). No case cited by petitioners remotely suggests that they were entitled to more elaborate process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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